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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 115.

THE CITY OF LAMPASAS, PLAINTIFF IN ERROR,

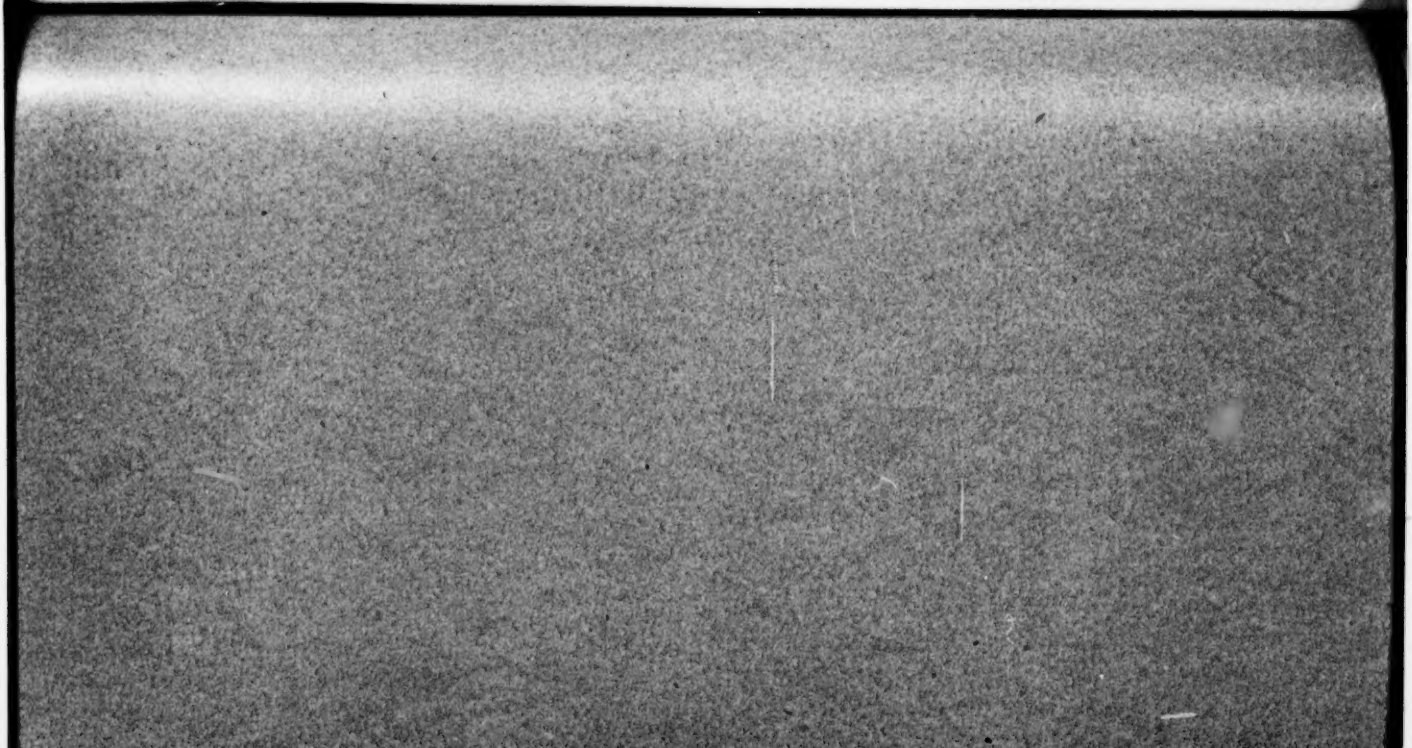
vs.

JAMES M. BELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED AUGUST 10, 1899.

(17,485.)



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1 *Caption.*

Be it remembered that there was opened and begun to be holden at Austin, Texas, a regular term of the United States circuit court for the western district of Texas, fifth circuit, on the 3rd day of July, A. D. 1899, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place—present, the Honorable Thos. S. Maxey, United States district judge; Honorable Henry Terrell, United States attorney for said district; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court—when and where the following, among other, proceedings were had, to wit:

JAMES M. BELL
vs.
CITY OF LAMPASAS. } No. 2296.

Plaintiff's First Amended Original Petition.

Filed July 11, 1899.

In the Circuit Court of the United States, Western District of Texas, Austin Division, July Term, 1899.

JAMES M. BELL
vs.
THE CITY OF LAMPASAS. } No. 2296.

In the above-entitled cause, by leave of the court duly obtained, now comes the plaintiff and files the following amended original petition in lieu of his original petition herein filed June 21, 1897:

To the honorable circuit court aforesaid:

2 Your petitioner, James M. Bell, complaining of the City of Lampasas, represents:

1. That plaintiff is a citizen of the State of Pennsylvania and resides in the city of Pittsburg, in Allegheny county, in said State.

2. That defendant is a municipal corporation duly chartered under the laws of the State of Texas, and is a citizen of said State of Texas and has its domicile in the city of Lampasas, in said State and within the western district thereof, and of which J. W. Townsend is the duly qualified and acting mayor and E. S. Noble is the duly qualified and acting treasurer, and J. F. White is the duly qualified and acting secretary, each of whom reside in said Lampasas county, Texas.

3. For cause of action against defendant, plaintiff alleges that heretofore, to wit, on the 6th day of January, 1885, and on the 21st day of March, 1885, and on the 27th day of March, 1885, the defendant, as a municipal corporation aforesaid, was authorized by its charter, amongst other things, to construct water works in said city and to issue bonds for the purpose of making such improvements.

4. That under and by virtue of the powers conferred upon defendant by its charter and by the laws of the State of Texas, as aforesaid, defendant, on January 6th, 1885, by ordinance duly passed by its city council and approved by its mayor, entitled "An ordinance to provide for the issuance of water-works bonds for the city of Lampasas and to provide for the payment of interest and sinking fund for said bonds," did ordain that the mayor of said city should have engraved or printed coupon bonds of the city of Lampasas, with semi-annual interest coupons attached, falling due on the first days of January and July of each and every year from and after their date, at the rate of seven per cent. per annum interest, said bonds to be styled "Lampasas City water-works bonds," and providing that said bonds should be drawn to mature at fifty
3 years from date of issuance, with the option reserved to the city council to redeem and retire certain parts of said bonds at certain periods before ultimate maturity; and further providing that said bonds should be issued to the amount of forty thousand dollars, or so much thereof as might be necessary, to be dated at the time of issuance and bear interest from said date; further providing that said bonds should at the time of their issuance be dated and signed by the mayor and countersigned by the city secretary and registered by the city treasurer; further providing that said bonds should be issued in the sum of one thousand dollars each, payable to bearer, and the principal and interest thereon should be made payable at S. M. Swenson & Son's bank, in New York city, or at the office of the said treasurer, in the city of Lampasas, the interest being payable semi-annually, as represented by the coupons attached, said ordinance further providing as follows: "Section 7. For the purpose of providing for the payment of the interest on said bonds, and to provide a sinking fund for the redemption of the same, a special ad valorem tax of twenty-five cents on every hundred dollars' worth of property is hereby levied and ordered to be assessed and collected for the year 1885 and for each and every year thereafter, until said bonds, principal and interest, are paid, on all property subject to taxation, within the city of Lampasas, and rendered and assessed by the city assessor and collector; provided, however, that the city council shall from time to time make a proportionate reduction in the amount or rate of the taxes hereby levied, whenever the whole amount of said tax shall not be necessary to meet the interest and sinking fund on the bonds of this issue then outstanding." Said ordinance further providing that said bonds should be sold and the proceeds thereof devoted exclusively to the construction of a suitable system of water works for fire protection, family supply, and for public and private purposes and for the purchase of such fire-department supplies as may be deemed necessary by the council, said system of water works to be operated in such manner as might be thereafter provided by ordinance, resolution, or otherwise.

4 5. That in pursuance of said ordinance and by virtue of the chartered powers of defendant, as aforesaid, and for the purpose of providing funds to construct a system of water works

for said city, the defendant, acting by and through W. J. Standifer, its duly qualified and acting mayor, and S. S. Potts, its duly qualified and acting secretary, and W. S. Morris, its duly qualified and acting treasurer, did on the 27th day of March, A. D. 1885, duly execute, in accordance with the requirements of said ordinance, its forty interest-bearing coupon bonds, numbered from one to forty, inclusive, and each bond being in words and figures substantially as follows, to wit:

"UNITED STATES OF AMERICA, *State of Texas.*

"Number —. Dollars, $1,000.

"*Lampasas City Water-works Bond.*

"The City of Lampasas will pay one thousand dollars to bearer, fifty years after date hereof, with interest from date at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year payable at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office in the city of Lampasas, on presentation of the proper coupon hereto attached.

"Issued under authority of an ordinance entitled 'An ordinance to provide for the issuance of water-works bonds of the city of Lampasas, and to provide for the payment of the interest and sinking fund of said bonds,' passed January 6th, 1885, a copy of which ordinance is printed on the reverse side hereof, to which reference is made.

"Witness the hand of the mayor of the city of Lampasas, attested by the city secretary, with the corporate seal affixed, in the city of Lampasas, State of Texas, this twenty-seventh day of March, A. D. 1885.

[L. S.] W. J. STANDIFER, *Mayor.*
S. S. POTTS, *Secretary.*

5 —— ——,
Comptroller State of Texas.
S. S. POTTS,
Secretary City of Lampasas.
W. S. MORRIS,
Treasurer City of Lampasas."

That the said bonds were registered by W. S. Morris, as the treasurer of the city of Lampasas, by his signature thereon, as above appearing, and said bonds were duly registered by the comptroller of the State of Texas, and a certificate to that effect signed by him was indorsed thereon.

6. That attached to each of said bonds and representing the semi-annual interest to accrue thereon on the first day of July and on the first day of January of each year during the fifty years that said bonds were to run there was executed as part and parcel of said bonds a coupon for each separate semi-annual installment of interest, substantially as follows:

$35. The City of Lampasas $35.

Will pay bearer thirty-five dollars, at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office, in the city of Lampasas, on the first day of ——, being six months' interest due on bond No. —.

(Signed) S. S. POTTS, *Secretary.*"

And plaintiff alleges that the blank in each of said coupons was filled with the proper date and number of the bond to which it was attached, to truly and correctly represent the obligation to pay semi-annual interest, as aforesaid.

7. That after said bonds and coupons were executed by said W. J. Standifer, as mayor; S. S. Potts, as secretary, and W. S. Morris, as treasurer, and were made payable to bearer, as aforesaid, and were duly registered by the comptroller of the State of Texas, as aforesaid, the said bonds were by defendant placed upon the market and sold in due course of trade, and defendant received in money for the purpose of providing a system of water works for public and private use and as affording a means of protection against fire, as by its said ordinance provided, the said sum of forty thousand
6 dollars, represented by its said forty bonds, each for the sum of one thousand dollars, as aforesaid, and defendant thereby became obligated and bound to pay to the bearer of each of said bonds and of each of said coupons the several sums of money specified in said bonds and in said coupons, as aforesaid.

8. That plaintiff in due course of trade and for a valuable consideration purchased and became and now is the owner of coupons Nos. 9 to 21, inclusive, and 24, 25, and 26 and 27, upon bonds Nos. 8 to 13, inclusive, issued by defendant, as aforesaid, which said coupons Nos. 9 represents the interest due on each of said bonds on January 1st, 1890, and each successive coupon up to No. 21, inclusive, represents the six months' interest due on each succeeding six months and became payable on the 1st day of July or January respectiveiy up to and including the 1st day of January, 1896, and that said coupon No. 24 represents the interest due on each of said bonds on July 1, 1897, and coupons Nos. 25 and 26 represent the interest due upon each of said bonds on January 1 and July 1, 1898, respectively, and coupon No. 27 represents the interest due upon each of said bonds on January 1, 1899. Wherefore plaintiff says that in due course of trade and for a valuable consideration he purchased and became and now is the owner of 102 of said interest coupons so attached to defendant's said bonds, as aforesaid, each of which was and is an obligation on the part of defendant as a corporation to pay to bearer the sum of $35.00, making in the aggregate for said one hundred and two coupons an obligation on the part of defendant to pay to bearer the sum of $3,570.00, with interest upon each of said coupons from the date of its maturity respectively at the rate of six per cent. per annum.

9. That, notwithstanding said coupons are long past due, the defendant repudiates its obligation to pay the same and refuses to

pay the same, to plaintiff's damage in the sum of four thousand dollars.

Premises considered, plaintiff prays that defendant be duly cited to answer this petition in terms of the law by citation issued
7 to its said officers, and upon trial for judgment for his said debt against defendant, and for interest and costs of suit, and for general relief; and he will ever pray, etc.

WEST & COCHRAN,
Attorneys for Plaintiff.

Endorsement: No. 2296. James M. Bell *vs.* City of Lampasas. 1st amended original petition. Filed July 11, 1899. D. H. Hart, clerk.

Defendant's First Amended Answer.

Filed July 11, 1899.

In United States Circuit Court for Western District of Texas, July Term, 1899.

JAMES M. BELL *vs.* CITY OF LAMPASAS. } No. 2296.

Comes now the defendant, and, by leave of the court for that purpose first had and obtained, files this its first amended answer in lieu of its original answer filed July 6th, 1897, and says:

Now comes the defendant, and, excepting to plaintiff's 1st amended original petition herein, says the same is insufficient in law, and shows no cause of action against this defendant, and of this it prays the judgment of the court.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

And for special exceptions to plaintiff's said petition the defendant says:

1st. That plaintiff's cause of action, if any he has or had, on the coupons mentioned in his petition, which became due on January 1st and July 1st, 1890, 1891, 1892, and January 1st, 1893, accrued more than four years before the institution of this suit, all of which appears from said petition; and if said petition shows any cause of action against defendant, it only shows a cause of
8 action for the coupons therein alleged to have become due on July 1st, 1893, January 1st and July 1st, 1894 and 1895, and January 1st, 1896, the amount due thereon, as shown from plaintiff's petition, being only twelve hundred and sixty dollars. Wherefore defendant says that if plaintiff is entitled to recover anything of it that his recovery, as appears from his petition, is barred by the statutes of limitation of the State of Texas as to all of the sums so sued for except said sum of twelve hundred and sixty dollars, and this court has no jurisdiction to hear this cause of action for that sum.

2nd. Said petition does not show whether defendant was incorporated by special act of the legislature of the State of Texas or under the general laws of said State, nor does it set forth the provisions of defendant's charter, and it cannot be determined therefrom whether the defendant had power to issue the bonds therein described.

3rd. It appears from the allegations of said petition that the bonds therein mentioned were issued in pursuance of an ordinance alleged by plaintiff to have been passed by defendant's city council, entitled "An ordinance to provide for the issuance of water-works bonds for the city of Lampasas, and to provide for the payment of interest and sinking fund for said bonds;" but it does not appear that said city council was by its charter authorized to pass such ordinance or provide for the issuance of said bonds, or that the defendant was of that class of municipal corporations authorized to issue such bonds, or to levy the special tax provided by sec. 7 of said ordinance, as said ordinance is set forth in said petition.

4th. It does not appear from said petition how the authority to issue bonds was conferred on defendant, whether it acquired the same by special charter or whether it acquired the same by reason of the provisions of the general laws of the State of Texas.

5th. The petition does not show that all the prerequisites necessary to authorize the issuance of the bonds were complied with by defendant or its officers.

9 6th. It appears from so much of the ordinance, by virtue of which said bonds were issued, as is recited in said petition, that it was required that the bonds be registered by the city treasurer of defendant at the time of their issuance, and it is not alleged that the same were so registered.

7th. It does not appear from said petition that said bonds were registered by the comptroller of public accounts of the State of Texas, or that said comptroller endorsed on said bonds his certificate of registration, authenticated by his official seal, as provided for by the statutes of said State.

8th. It appears from the allegations of said petition that defendant was a municipal corporation "duly chartered under the laws of the State of Texas," and it does not appear therefrom that defendant had an existence as a municipal corporation prior to the year 1885, which said allegations amount to an allegation that the defendant is a municipal corporation chartered and created under the general laws of the State of Texas, and defendant says all charters of and attempts to create municipal corporations under the general laws of the said State are null and void, the legislature of said State in the enactment of said general laws having attempted to delegate to the voters the right to form municipal corporations and fix the boundaries thereof.

And of each and all of said exceptions the defendant prays the judgment of the court.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

And the defendant, further answering, if its exceptions are overruled, denies all and singular the allegations in plaintiff's petition contained; and of this it puts itself upon the country.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

And the defendant, The City of Lampasas, further answering, says that it, the city of Lampasas, was created and incorporated as a municipal corporation and city by an act of the legislature
10 of the State of Texas entitled An act to incorporate the city of Lampasas, in the county of Lampasas, approved April 18th, 1873, and from that time until now has continued to be a municipal corporation and city; that neither the bonds nor coupons mentioned in plaintiff's petition nor either of them were issued or signed by or by the authority of this defendant, the said City of Lampasas, so incorporated, nor by or by the authority of the mayor, city secretary, city treasurer, city council, board of aldermen, or other officer of said city. Wherefore the defendant says that neither of said bonds or coupons is or was the act of defendant; that the organization assuming the corporate name of the city of Lampasas in and for some time prior to the year 1885, and of which W. J. Standifer assumed to be mayor, S. S. Potts assumed to be secretary, and W. S. Morris assumed to be treasurer, and by which and whom said bonds and coupons purport to have been issued and signed, is not and never has been duly incorporated.

MATTHEWS & BROWNING,
Attorneys for Defendant.

J. W. Townsen, being duly sworn, upon his oath says the matters and things stated in the foregoing plea are true, and that he, the said J. W. Townsen, is mayor of defendant city.

J. W. TOWNSEN.

Subscribed and sworn to before me this 29th day of June, A. D. 1899.

W. H. BROWNING,
[L. S.] *Notary Public, Lampasas Co., Texas.*

And the said defendant, The City of Lampasas, further answering, says that it was incorporated as a body politic and corporate under the name and style of the corporation of the city of Lampasas by a special act of the legislature of the State of Texas entitled "An act to incorporate the city of Lampasas, in the county of Lampasas," approved April 18th, 1873, in and by which act the boundaries of said city were defined and established, and by reason of the provisions of said act this defendant became an incorporated city with the boundaries set forth in said act, within which was an area
11 of about 553 acres, and ever since that time has continued to be an incorporated city or municipal corporation.

That section three (3) of said act provides for the election of a mayor and eight aldermen of said city by the qualified electors of

said city, and section five (5) thereof provided that the mayor and aldermen should appoint a marshal, secretary, and city attorney of said city, and section nine (9) thereof limited the right of suffrage to male residents of said city who had attained the age of twenty-one years, and section thirteen made provision for the first election of mayor and aldermen and provided that all subsequent elections should be held on the first Monday in January every second year by the mayor, and section fourteen (14) provided that said act should take effect and be in force from and after its passage. For a more particular description of said act reference is made to page 288 of the Special Acts of the legislature of said State passed in the year 1873 and printed by the authority of said State; that in pursuance of the provisions of said act the city government of the said city of Lampasas so incorporated was in the year 1873 organized, and until the — day of ——, 1876, maintained its organization with all officers required by said act.

That afterwards, about the 21st day of February, 1883, when said city was and for nearly six years had been without officers and without any election therefor having been held, the county judge of Lampasas county, ignoring the said act and ignoring the fact that the said city of Lampasas was an incorporated city, made and caused to be entered on the minutes of the commissioners' court of said county an order, which, after reciting that there had been filed in his office an application by more than fifty qualified voters of the town of Lampasas, residing within the boundaries described in said order, asking that an election be held to determine whether or not the said town should be incorporated under the name of the city of Lampasas, with the boundaries mentioned in said order, which boundaries were fixed by the signers of said petition, and that there were more than one thousand inhabitants living within said
12 boundaries, directed and ordered "that an election be held at Dr. Lincecum's office on Western avenue, one door north of Cassell's drug store, in said town, and within said boundaries, on the 6th day of March, 1883, for the purpose of submitting to a vote of the qualified voters residing within said boundaries whether said town shall be incorporated as the city of Lampasas, with the boundaries aforesaid, and C. N. Witcher is hereby appointed as the presiding officer of said election;" that afterwards, to wit, about the 14th day of March, 1883, the said county judge made and caused to be entered on the minutes of the commissioners' court, as aforesaid, another order, which, after reciting that it appeared from the returns made to him of an election held within the bounds therein described on the 6th day of March, 1883, to determine whether or not said town should be incorporated as the city of Lampasas, with the boundaries in said last-named order mentioned, that a majority of the votes cast at said election were in favor of such corporation, declared and ordered that the inhabitants of said town be, and by virtue of said election were, incorporated as the city of Lampasas with certain boundaries, which were set forth in said order, and which were the same as those set forth in said application and in said order made about the 21st day of February,

1883, and which included an area of about 1,500 acres, twice as many lots and blocks actually occupied as town property, and more than twice as many inhabitants as were included with the boundaries described in said special act of the legislature passed in 1873, and included most of the territory described in said act.

That said county judge afterwards made an order for an election of officers for said Territory and organization, which he had declared to be organized as the city of Lampasas, and in pursuance thereof an election was held by the inhabitants of said Territory on, to wit, the 17th day of April, 1883, and certain persons were declared by said county judge to be elected to the various offices, including the office of mayor, marshal, city attorney, treasurer, assessor and collector, engineer, and five aldermen; S. S. Potts, whose name appears in plaintiff's petition as signed to the bonds
13 and coupons mentioned therein as secretary, having been elected secretary at said so-called election held on April 17th, 1883, and W. S. Morris, whose name appears in plaintiff's petition as signed to said bonds as treasurer, having been elected treasurer at said so-called election held on April 17th, 1883. Said Potts, who lived outside of the territory mentioned in said special act, and said Morris claimed to be secretary and treasurer, respectively, of said organization claimed to have been incorporated as the city of Lampasas by virtue of said petition or application, election for incorporation and orders of said county judge, and said other proceedings had and made in said year 1883; and after said pretended election held on April 17th, 1883, other pretended elections were held in said territory described in said orders, from time to time, for municipal officers, and all of said elections held in 1883 and said subsequent elections were held in accordance with the general laws of the State of Texas in regard to cities, and not in accordance with said special act, and that at all such elections votes were cast by inhabitants residing in said boundaries described in said special act and by persons residing outside thereof, but in the boundaries described in said orders of said county judge, and at such elections so held persons were elected to the office of aldermen and to other offices who resided outside of the boundaries described in said original act, but inside of the boundaries described in said orders of said county judge.

That during all the time from 1876 to the year 1889 this defendant, who was and is the only legally created and incorporated municipality under the name of the city of Lampasas, was without officers, and during all that time there were no persons claiming to be or act as such officers of this defendant, and all persons claiming or pretending to act as officers of the city of Lampasas during that period were claiming and pretending to act under the said organization or pretended corporation attempted to be created as aforesaid in the year 1883, and were not claiming to act under said act of 1873.

14 That none of said bonds or coupons mentioned in plaintiff's petition were issued or signed by or by authority of defendant or any of its officers, but if same were signed or issued

by any persons they were signed and issued by persons assuming to be officers of said organization attempted to be created by said proceedings in 1883, and neither it, though acting under the name of the city of Lampasas, nor its pretended officers, in issuing and signing the same, attempted or pretended to bind this defendant, but intended and attempted to bind such illegal organization attempted to be created by said proceedings in 1883. Wherefore defendant says it is not liable on said bonds or coupons.

That heretofore, to wit, about the 29th day of October, 1889, and while one T. J. Largen was assuming to be mayor of said pretended city of Lampasas attempted to be incorporated by said proceedings in 1883, and other persons were assuming to hold the other offices of said pretended city of Lampasas attempted to be created by said proceedings in 1883, the State of Texas, upon the relation of W. B. Abney, instituted a proceeding in the nature of a *quo warranto* proceeding in the district court of Lampasas county, in which the city of Lampasas, as well as the said pretended city of Lampasas, was situated, against said T. J. Largen and such other persons assuming to be officers under such illegal organization created by said proceedings in 1883. The style of said suit so instituted by the State of Texas was "The State of Texas, on the relation of W. B. Abney, *versus* T. J. Largen *et als.*," and the number thereof was 1227 on the docket of said district court; and the object of said suit was to have the defendant therein prevented and enjoined from usurping or intruding into, holding, or executing the offices which they claimed to hold by virtue of said pretended corporation created under said proceedings in 1883; that said cause coming on to be heard in said district court on the 20th day of November, 1889, the defendants therein were adjudged guilty of usurping, intruding into, and unlawfully holding and executing the offices claimed by each as aforesaid, and they were each enjoined from further usurping, intruding into, holding, or executing the offices so claimed by each.

That in and by the pleadings in said cause the only material question involved was the legality or illegality of said proceedings in 1883, whereby said pretended city of Lampasas was attempted to be incorporated, and the rights of defendant therein to hold their respective offices was dependant upon the legality of said proceedings in 1883; that from said judgment of the district court in said cause No. 1227 the defendants appealed to the supreme court of the State of Texas, which last-named court, on the 31st day of January, 1890, affirmed the said judgment of the district court; that immediately after said last-named date the pretended municipal organization under said proceedings of the year 1883 was abandoned, and no further proceedings or acts have since been had or done thereunder or by virtue thereof, and the water works thereof were taken possession of by the owners of some or all of the bonds claimed by plaintiff to have been issued; but thereafterwards, in the year 1890, officers of the city of Lampasas, as incorporated by special act of the legislature, were duly elected, and they and their successors in office have since said last-named year continued to admin-

ister and are now administering the affairs and business of defendant, and have not been and are not acting under or for said pretended corporation by which said bonds were issued, and have taken possession of none of the property of said pretended corporation, nor had the opportunity of taking possession thereof; that the ordinance by virtue of which the bonds and coupons mentioned in plaintiff's petition were issued, as appears from said petition and from the copy of said ordinance printed on the back of said bonds, if any such ordinance was passed by any city or council, was passed by a city council assuming to be the city council of the city of Lampasas, as attempted to be created by said illegal proceedings in 1883, and by persons assuming to be the city council of said pretended corporation attempted to be created in 1883 by the proceedings hereinbefore mentioned, but who did not assume at
16 the time of the passage of same, or at any other time, to be the city council of this defendant. Wherefore defendant says it is not liable on said coupons.

That by the terms of said special act of the legislature by which defendant became an incorporated city the right to pass ordinances, impose taxes, and issue bonds for public improvements was conferred upon the mayor and board of aldermen, composed of eight members, and such board of aldermen was made the legislative body of the city created by said special act, and no powers whatever were conferred upon a city council or upon a board of aldermen composed of five members; wherefore defendant says that even if the persons who acted as said council assumed to be and acted as the city council of defendant in passing the ordinance alleged by plaintiff to have been passed, still the said ordinance, if any was passed, as alleged, was not binding on defendant and did not authorize the issuance of the bonds alleged by plaintiff to have been issued; that section 12 of said special act by which defendant was incorporated was as follows: "All ordinances and resolutions enacted by said corporation shall be published by posting notice at three public places in the limits of the corporation or by publishing for at least three successive weeks in a newspaper published within the limits of said city."

That section 9 of said ordinance, which is No. 59 printed on the the back of said bonds alleged by plaintiff to have been issued by the defendant, is as follows:

"SEC. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable, the city council may designate by an order entered of record in the minutes, the numbers and amount of the principal, (not exceeding $10,000.00) and date of payment of such bonds of this issue as the city desires to redeem, said numbers being designated by lot or otherwise, as the council may then determine, provided the numbers designated are consecutive, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice
17 personally or otherwise, may be given to the holder of such designated bonds, their agents or representatives, as the council may determine at the time of such designation, and such

designated bonds shall be paid upon presentation, and shall cease to bear interest from and after the date of payment fixed by said order; and at the end of each period of five years thereafter five thousand dollars ($5,000) of the principal of said bonds may be redeemed in like manner."

That there appears also printed on the back of said bonds alleged to have been issued by defendant another ordinance, which is as follows:

"*Ordinance No. 65.*

"An ordinance to be entitled 'An ordinance to amend section 9, of ordinance No. 59, passed and approved January 6th, 1885.'

"SECTION 1. Be it ordained by the city council of the city of Lampasas, That section 9, of ordinance No. 59, passed and approved January 6th, 1885, be so amended as to read hereafter as follows:

"SEC. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable the city council may designate by an order entered of record on the minutes, the numbers and amount of the principal not exceeding $10,000 and date of payment of such bonds of this issue as the city desires to redeem, said numbers so designated shall be consecutive, beginning at No. 1, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice, personally or otherwise, may be given to the holder of such designated bonds, their agents or representatives, as the council may determine at the time of such designation, and such designated bonds shall be paid upon presentation and shall cease to bear interest from and after date of payment fixed by said order; and at the end of each period of five years thereafter, five thousand ($5,000) dollars of the principal of said bonds may be redeemed in like manner."

"SEC. 2. That this ordinance take effect and be in force from and after its passage.

"Passed March 21st, 1885.

"Approved March 21st, 1885.

"W. J. STANDEFER, *Mayor.*

"Attest: S. S. POTTS, *Secretary.*"

And defendant avers that if said ordinance No. 59 was
18 passed by said city council, then said ordinance No. 65, amendatory thereof, was also passed by the same city council and made material changes therein; that said amendatory ordinance was not passed or approved until March 21st, 1885, and said bonds, as appears from plaintiff's petition, were issued on the 27th day of March, 1885; wherefore defendant says that said amended ordinance could not have been published or posted for the time required by said special act, and it had not taken effect at the time said bonds purport to have been issued or at the time they were in fact issued, if the same were ever issued.

And defendant says that even if it should be held that the persons acting as members of the city council which passed it had the

right to pass and did pass the ordinance printed on the back of the said bonds alleged to have been issued by defendant and said ordinance became effective, still the defendant is not liable on said bonds, because same were not executed, signed, issued, or registered or delivered under the circumstances authorized by said ordinance or the laws of the State of Texas then in force.

That sections 3, 4, and 5 of said ordinance No. 59 are as follows:

"SEC. 3. Said bonds shall be issued to the amount of forty thousand dollars ($40,000) or so much thereof as may be necessary, shall be dated at the time of issuance, and shall bear interest from said date of issuance.

"SEC. 4. Said bonds shall, at the time of their issuance, be dated and signed by the mayor, countersigned by the city secretary, and registered by the city treasurer.

"SEC. 5. The city secretary and the city treasurer shall each keep a record of the number, date of issuance, and amount of said bonds, and the number, amount and date of maturity of the coupons thereto attached, and shall endorse the countersigning and registration thereof on each of said bonds."

And defendant avers that said bonds were never registered by the city treasurer, as required by section 4 of said ordinance,
19 and said city treasurer did not endorse on each or any of said bonds the registration thereof.

Section 10 of said ordinance provided that said bonds provided for therein should be sold at not less than par and in such manner as was at the time of the passage of such ordinance provided for or as might thereafter be provided for by ordinance, resolution, or otherwise, and that the proceeds of said bonds should be devoted exclusively to the construction of a suitable system of water works for fire protection, family supply, and other public and private purposes and for the purchase of such fire department supplies as might be deemed necessary by said city council.

And defendant avers that said city council did not after the passage of said ordinance make any provision for the sale of said bonds, and same were in fact not sold for as much as their par or face value and were not sold for any sum, but some person, to defendant unknown, delivered all of said bonds mentioned in said ordinance to some person unknown to defendant, but believed to be F. O. Brown, in payment for a system of water works, which at the time of such delivery was of a value not exceeding twenty thousand dollars, and same were so delivered to evade the provisions of said ordinance, which required that the said bonds should be sold at not less than par.

And defendant further says that said bonds have not been registered by the comptroller of public accounts of the State of Texas in a book kept for that purpose, or if the same have been so registered, then said comptroller has not endorsed on each or any of the bonds so registered his certificate of registration, authenticated by his official seal, as required by law; wherefore defendant says it is not liable on said bonds.

And the defendant further says that at the time said bonds pur-

port to have been issued, to wit, in the year 1885, the only existing legal city of Lampasas was this defendant, which was, as before shown, incorporated by special act of the legislature in 1873,
20 and that the taxable property within the boundaries of defendant during either the year 1884 or 1885 did not exceed in value the sum of one million dollars, and that the levy and collection of a tax of twenty-five cents on the one hundred dollars' valuation of taxable property within defendant's boundaries at any time during the years 1884 or 1885 or since would not produce enough revenue to pay the interest on the issue of $40,000 of bonds mentioned in plaintiff's petition and create a sinking fund of at least two per cent.; wherefore defendant says said bonds were issued without authority of law and contrary to provisions of the constitution and laws of the State of Texas.

And defendant further says that heretofore, to wit, from February 1st, 1883, to January 1st, 1886, the defendant being the only existing legal city of Lampasas and having within its boundaries, as fixed by said special act of 1873, only an area of about 553 acres and a population of less than one-half that included within the boundaries as set forth in said order of said county judge—which last-mentioned boundaries included an area of 1,495 acres—and there then being no general law authorizing the incorporation of cities so as to include within their boundaries a city already incorporated by special act of the legislature or otherwise, and there then being no law by which the boundaries of a city incorporated by special act of the legislature could be extended or by which additional territory could be added thereto, and this defendant and its inhabitants, acting through its board of aldermen, then having a right to determine whether the provisions of the Revised Statutes relating to cities and towns should be adopted in lieu of said special charter, and having the right to determine what public improvements should be made within its boundaries and what taxes should be levied on the property therein, a number of people residing within the boundaries described in said order of said county judge, most of whom resided outside of defendant's boundaries, caused the application hereinbefore mentioned to be presented to said
21 county judge and caused each and all of said orders to be made by said county judge and caused said pretended municipal organization of 1883 to be formed without defendant's voters having an opportunity to be heard on the question of the boundaries of the proposed new corporation, and by reason of the fact that a majority of the voters within the boundaries described in said orders of said county judge resided outside of defendant's boundaries it was possible for them to organize said pretended corporation of 1883, including all the inhabitants of defendant, without their consent, all of which was done over the protest and opposition of a great number of tax-payers and voters within defendant's boundaries prescribed by said special act of 1873; and thereafterwards the officers of said organization attempted to be created by said proceedings in 1883 passed said ordinances mentioned in plaintiff's petition, by virtue of which said bonds were afterwards issued, by

which ordinances a special ad valorem tax of twenty-five cents on every one hundred dollars' worth of property was levied and ordered to be assessed and collected for the year 1885 and subsequent years on all property subject to taxation within the city of Lampasas; and defendant therefore says that said municipal organization of 1883 was formed and said ordinances passed without authority of law, and if said ordinances are enforced as now sought to be enforced and said bonds are held to be binding on this defendant, then the necessary result thereof will be that the tax-payers residing within the boundaries fixed by said act of 1873 will be required to pay more than one-half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law and in violation of section 1 of the 14th amendment to the Constitution of the United States.

And defendant further says that said pretended organization of 1883, by the officers of which said bonds were issued, was attempted to be created and formed under the provisions of chapters one and eleven of title 17 of the Revised Statutes of 1879 of the State of Texas and acts of the legislature of said State amendatory
22 thereof, and all of said orders made by said county judge were made in accordance with the provisions thereof, and said bonds were attempted to be issued in accordance with the provisions thereof; that the legislature did not fix the boundaries of said pretended organization, nor did it or said statutes or amendments thereto make any provision by which the power of the legislature to fix boundaries of municipal corporations was delegated to any recognized judicial, executive, or political organization, but the power was delegated by said chapter 11 to any 20 qualified voters, and by said chapter 1 to any fifty qualified voters to fix the boundaries of the territory in which they propose to form a municipal corporation, and the power to determine whether cities incorporated by special acts should be governed by the provisions of the special acts or by the general laws of the State relating to municipal corporations was by said chapter delegated to the city councils of such cities; that said delegation of legislative power is in violation of article 2 of the constitution of the State of Texas, and that chapters I and II of title 17 of said Revised Statutes of the State of Texas and acts amendatory thereof are in violation of sec. 1 of the 14th amendment to the Constitution of the United States, in that they provide for the formation of municipal corporations with power to levy taxes on property therein with boundaries not fixed by the legislature or by any body or tribunal before whom the residents of the territory proposed to be incorporated could be heard; and said pretended organization of 1883 attempted to be formed under said unconstitutional laws is null and void, and its attempt and the attempt of its officers to bind the residents and tax-payers of defendant by the issuance of said bonds, and to levy and collect a tax on their property to pay said bonds, was an attempt to deprive them of their property without due process of law, in violation of said section 1 of the 14th amendment to the Constitution of the United States.

And defendant further says that the plaintiff's cause of
23 action, if any he has or had, on the coupons mentioned in his petition, which became due on January 1st and July 1st, 1890, 1891, 1892, and January 1st, 1893, accrued more than four years before the institution of this suit, and a recovery thereof is barred by the statutes of limitation of the State of Texas, which are here interposed to such a recovery.

And defendant, further answering, says that after said organization created by said proceeding had in 1883 had been abandoned, and after said pretended corporation had ceased to transact any business, all property it had acquired from the year 1883 until about January 31st, 1890, was also abandoned by it and its pretended officers; that among such property was said system of water works, including pumps, boilers, stand-pipe, and the real estate on which same was situated, water mains and other fixtures and supplies, all of said system of water works except about two-thirds of the water mains being outside of the territory described in said special act, but inside of the boundaries of said pretended corporation; that prior to such abandonment one H. E. Hediman, who was acting as superintendent of such water works under the employment of said pretended corporation organized in 1883, was in possession and control of said system of water works and continued in such possession as such superintendent until the time of such abandonment, and thereafterwards continued in such possession until about January 31st, 1891, claiming the right to hold possession of and operate same because said pretended corporation was indebted to him; that about January 31st, 1891, one W. N. Coler, Jr., claiming to own, hold, and control all of the bonds mentioned in plaintiff's petition, and who did in fact then own, hold, and control some of said bonds, but which of them defendant does not know, and then believing that he had no cause of action against the City of Lampasas thereon, induced said Hediman to deliver to him the possession of said water works, as the owner of all of said bonds, and the said Coler and his assigns have from then until now continued in possession thereof, claiming tc be the owners thereof and receiving all the revenue
24 thereof; that after the decision of said case of Largen *vs.* The State and the said abandonment of said property neither the plaintiff or any other holder of said bonds have ever asserted any right to recover thereon until the time of the institution of this suit; that immediately after the decision of said case of the State of Texas *vs.* Largen *et al.*, in the district court of Lampasas county, the plaintiff and the holders of said bonds had notice of said decision, and they also had notice of the judgment of the supreme court of said State of Texas affirming the judgment of said district court immediately after the same was rendered, and thereafterwards no interest was paid on said bonds, though the same had been promptly and regularly paid theretofore as the interest coupons became due; that the defendant and the plaintiff herein and the other holders of said bonds thereafterwards believed that under the law as announced in the opinion of said supreme court in said case of Largen *vs.* The State of Texas the said bondholders had no claim or cause of action

against defendant on said bonds, and continued so to believe until the time of the institution of this suit; that by the non-action of the said bondholders and their failure to demand and sue for the interest due on the coupons of said bonds which matured on and after January 1st, 1890, the defendant was induced to believe and did believe that the holders of said bonds had abandoned any claim they might have had against the defendant on account of the issuance of said bonds, and did not intend to assert any right thereunder, and, so believing, afterwards, to wit, about the 28th day of March, 1894, issued its negotiable bonds, dated January 1st, 1894, to the amount of eighteen thousand dollars, bearing interest from date at the rate of six per cent. per annum, due — years after date, and sold the same for the purpose of obtaining money to build a public school building in the said city of Lampasas, which bonds were registered in the office of the comptroller of the State of Texas on April 2nd, 1894, and with the proceeds of sale of said bonds known as school bonds did build said public school building, all of which bonds are still outstanding and unpaid, and the purchasers of said last issue of bonds purchased same believing that the holders of the issue of bonds described in plaintiff's petition had abandoned all claims against the defendant thereon; that the taxable property of the city of Lampasas is now less than eight hundred thousand dollars in value, and the amount of revenue that can be derived therefrom and appropriated to pay the interest thereon and provide a sinking fund of two per cent. is only about eighteen hundred dollars; that said school bonds would not have been issued by defendant or bought by those who purchased same or those who now hold same except for the action of the holders of the bonds described in plaintiff's petition, whereby the defendant and said purchasers were induced, as aforesaid, to believe that the holders of said bonds described in plaintiff's petition had abandoned all claim against defendant thereon; and, so believing that the holder- of the bonds described in plaintiff's petition had abandoned all claim against the city of Lampasas thereon, and being induced to so believe by the said non-action of such holders, as well as by the action of said holders in trying to make individually liable thereon the persons who, claiming to be officers, issued said bonds, and in trying to make liable thereon said F. O. Brown, who put them in circulation, and brokers who had sold or negotiated said bonds, all of which efforts of said holders were made upon this belief and theory that said water-works bonds were not binding obligations, the defendant, since the said 1st day of January, 1894, has contracted various and sundry debts and obligations in establishing a fire department, building bridges, and making other public improvements which it would not have contracted if it had believed said water-works bonds to have been valid, and which it will be unable to pay and its credit will be irreparably ruined, and those who have become its creditors since said last-named date will not be able to collect any part of their said claims if said water-works bonds are held to be obligations binding on de-

fendant, for if valid the power of the city to create indebted-
26 ness was exhausted by their issuance, and by reason of such action and non-action of the holders of said water-works bonds, inducing defendant to believe that they did not intend to claim any rights against defendant thereon, the defendant has refrained from making any effort to obtain possession of said water works, but the same has from the year 1890 until now remained in the possession of said Coler and his vendees, and the defendant has recognized their right thereto and become barred from recovering possession of same by the statutes of limitation of the State of Texas. Wherefore defendant says the plaintiff is estopped from recovering of defendant on the coupons sued on.

Premises considered, defendant asks to be discharged with its cost.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

Endorsement: No. 2296. James M. Bell *vs.* City of Lampasas. Defendant's first amended answer. Filed July 11, 1899. D. H. Hart, clerk. Fiset & Miller, attorneys-at-law, Austin, Texas.

Plaintiff's First Supplemental Petition.

Filed July 11, 1899.

In the U. S. Circuit Court for the Western District of Texas, at Austin.

JAMES M. BELL
vs.
THE CITY OF LAMPASAS. } No. 2296.

In the above cause now comes the plaintiff and files this his 1st supplemental petition in response to defendant's 1st amended original answer herein filed, and for rejoinder to the matters therein pleaded plaintiff submits:

1st. He demurs generally to the facts pleaded by defendant and says the same constitute no defense to plaintiff's suit, and of this he prays judgment.

27 2nd. He demurs specially to said answer and says the same shows that the city of Lampasas has been at all times an existing, valid municipal corporation, and shows affirmatively that the qualified voters of said city in the exercise of the legislative power delegated to them under the general laws of the State, did, by the adoption of the general charter in 1883, upon the vote of the people duly had under the forms of law, thereby repeal the special charter of 1873 to the same effect as though the legislature had by its act granted this general charter covering the territory therein embraced, and for this reason, whatever may have been the provisions of said special charter, all powers conferred in the general charter were conferred upon said city of Lampasas, and of this plaintiff prays judgment.

3rd. Said answer shows upon its face that the city of Lampasas, as chartered by general act, upon vote of the people in the exercise of their delegated legislative authority, is a valid corporation, and that such city, covering the full limits therein set out, continues to exist, and that the obligations herein sued upon are valid and binding obligations of said city, and that it is immaterial what officers are serving it as mayor, aldermen, etc., or whether they are exercising jurisdiction over all the territory which they have the lawful right to or not, and of this plaintiff prays judgment.

4th. Further specially excepting, plaintiff says that the judgment in the *quo warranto* proceeding of The State of Texas *vs.* T. J. Largen *et al.* is not properly pleaded and cannot avail defendant as a defense herein, because it is not pleaded therein that the holders of the water-works bonds (the coupons from which are herein sued upon) were made parties defendant, and therefore said judgment is a nullity and said city of Lampasas is at this time lawfully existing under said incorporation of 1883, and as such is liable to plaintiff herein, and of this plaintiff prays judgment.

5th. Further specially excepting, plaintiff says that it affirmatively appears from defendant's answer that said city of
28 Lampasas, in 1885, while acting as such and recognized by the State of Texas as a municipal corporation having power to build water works and issue negotiable bonds to pay for the same, did in fact issue such bonds in absolute good faith, without objection on the part of the State or of any citizen or tax-payer of said city, and place such bonds upon the market, and therefore it appears from said petition that the State and the citizens of said city became and are estopped from questioning the regularity of said incorporation or doing any act which would in any manner impair the obligations of said city to pay said bonds by the levy and collection of the full tax provided for as part of the contract to pay said bonds, and of this exception plaintiff prays judgment.

6th. That as to the allegation that after the judgment in the Largen case the officers then acting for said city of Lampasas abandoned their offices and the water works for which the coupons in suit were in part executed were taken possession of in January, 1891, by one Coler, and have since been in his possession, plaintiff says that these allegations constitute no defense to this suit, because it is not alleged that there was any legal settlement of said bonds, and because it is not alleged that the said Coler represented the bonds from which the coupons in suit were taken, and because since said coupons and their principal bonds were negotiable instruments, payable to bearer, no such settlement would be effective in law without requiring said Coler to surrender said bonds and retire the same, together with the unmatured interest coupons, from circulation.

7th. That the allegation in reference to the subsequent action of the defendant in issuing other bonds and creating other indebtedness is wholly insufficient in law to create an estoppel against the holders of the water-works bonds.

8th. That from the facts pleaded by defendant showing that after Largen and his associates abandoned their offices there was an at-

tempted reorganization of the corporation of the city of Lampasas,
and that there is now in existence a city government assum-
29 ing to act for and in the name of the city of Lampasas, it
therefore appears that under the validating act of the legislature of the State of Texas passed and which became a law on the 12th day of March, 1891, the city of Lampasas, with its boundaries as fixed in the charter adopted by vote of the people in 1883, became a perfect, valid corporation and liable to plaintiff upon the coupons involved in this suit.

Upon each of the foregoing exceptions plaintiff prays the judgment of the court.

WEST & COCHRAN,
Attorneys for Plaintiff.

And for further reply to the merits of the defenses set up by defendant, if any be needed thereto, plaintiff avers:

1st. That if any question can arise as to which charter the city of Lampasas was acting under in January and March, 1885, when said city issued and placed upon the market its negotiable bonds and coupons, a part of which are herein sued upon, then this plaintiff says that said city had full authority under either charter to issue said bonds and coupons, in this, that the special charter granted to defendant, as pleaded by it, expressly authorized defendant, among other things, to construct water works and to issue bonds to pay for such public improvements, and if it be held that the city of Lampasas, as existing in 1885, does not now exist, a proposition which plaintiff denies, then plaintiff says that the mayor and city council which did issue such bonds were acting in good faith as officers of the city of Lampasas, assuming full authority so to do without dispute by the State of Texas, and as such were *de facto* officers of said city, and acting as they did in the exercise of a power conferred upon them in said special charter, their acts bind the defendant now existing and the coupons sued upon as valid obligations of said defendant, and as such plaintiff prays judgment thereon.

2nd. For further special reply said plaintiff alleges that by
30 the act of adopting the general charter in 1883, by vote of
the people who resided and did business in said town or city of Lampasas and were citizens thereof, following urban pursuits, such action on the part of the people, by this act of exercising a delegated legislative power, thereby made such city a valid corporation under said general charter, notwithstanding the said special charter, and that to the extent of the limits fixed in this general charter the city of Lampasas became and has ever since been a legally existing corporation, and that all lands and property within said limits are now within the jurisdiction of the city of Lampasas, and if defendant's officers are not assuming jurisdiction over said entire limits that their failure so to do in nowise affects the validity of plaintiff's coupons, and he prays judgment establishing his said debt as against the corporation with the full limits existing in 1885, when said debt was created.

3rd. Plaintiff specially denies that the judgment of ouster pleaded by defendant as occur-ing in 1890 by the suit of The State *vs.* Largen *et al.* has any binding force whatever, but is an absolute nullity because the holders of the water-works bonds and of the coupons herein sued upon were not made parties to said suit, and because to give said judgment effect would be to declare that the State could destroy the corporation and with it the agencies existing when said contracts were made to assess and collect the special tax levied as part and parcel of said contract as a means of paying said bonds and coupons, and thereby impair the obligations of a contract in violation of the Constitution of the United States and of the State of Texas; plaintiff prays judgment accordingly.

4th. Plaintiff further alleges that, whatever may have been the legal effect of said judgment of ouster, the defendant, City of Lampasas, immediately after said Largen and others abandoned their said offices, proceeded to reorganize its city government under its said special charter, and that its mayor and city council again met on March 19th, 1890, for the first time under this reorganization, and on March 22nd, 1890, said city counsil duly passed a reso-
31 lution to abandon said special charter and to adopt in lieu thereof the same general charter under which it had been acting from 1883, and that thereafter, on December 26th, 1890, by proper vote duly and legally had and certified by persons living within what was known as the Lampasas Springs first and second additions to the town of Lampasas, the said city council added the principal part and substantially all of the inhabited portion of that part of the territory embraced within the incorporation of 1883, which was outside of the limits fixed in the charter of 1873; and plaintiff alleges that the business part of the city of Lampasas has at all times been within the special charter limits of 1873, and that within this area nearly all persons living in said town, whether within the charter limits of 1883 or in the fifteen or twenty additions laid out into city lots, parts of which are outside of said limits, have at all times done business following urban pursuits, and that after attaching the additions in December, 1890, fully ninety per cent. of the population and a like large proportion of the tax values of said incorporation as existing from 1883 to 1890 were brought within the city of Lampasas, as claimed by defendant, and there was also brought within said limits the system of water works, all bridges, graded streets, and other property of said city government of 1883. Wherefore plaintiff says that by this act of reorganization and attaching additional territory the city of Lampasas within this restricted area in any event became the lawful successor of said pre-existing *de facto* organization, and as such succeeded to the ownership of said system of water works and its other properties and become bound for all of its debts, including the coupons here sued upon, and as such plaintiff prays judgment.

5th. Plaintiff further alleges that, whatever may have been the vice or irregularity in the adoption of the charter in 1883 by the vote of the people, the citizens and tax-payers of said city of Lampasas acquiesced in the acts of their officers in constructing a sys-

tem of water works and in issuing its negotiable bonds to pay
32 for the same, and that by such acquiescence in the act of their said officers all persons embraced in said limits became and are estopped to deny the validity of said bonds, and that by permitting said corporation to exist and to issue its negotiable bonds in payment of a system of water works and by the registration thereof by its comptroller, the proper executive officer of the State, appointed by law for such purpose, the State of Texas lost its right to interfere in any manner with said city of Lampasas in its proprietary or private rights connected with the ownership of said water works and its rights and duties to assess and collect the taxes specially contracted to be levied to pay said bonds, and that any attempt by the State to interfere therewith would be void as impairing the obligation of the contract, and plaintiff here pleads that whatever effect the proceedings of ouster against Largen *et al.* may have been in other respects, it has no binding force or effect as against plaintiff as the holder of its coupons connected with said bonds.

Plaintiff further alleges that at the first session of the legislature after the decision was rendered in the said Largen case said legislature, having full power and right so to do, did pass two acts in substance and effect validating all acts done by cities and city councils acting as *de facto* corporations, and also validating their charters, and plaintiff here pleads said validating acts in aid of his said coupons and says the same validated and cured any vice or irregularity existing in defendant's charter of 1883, and that upon the passage of said acts defendant's officers were vested with full authority over all territory embraced in said charter of 1883 and now have such authority and should exercise the same in accordance with law; and plaintiff prays judgment accordingly.

WEST & COCHRAN,
Attorneys for Plaintiff.

Endorsed: James M. Bell *vs.* City of Lampasas. 1st supplemental petition. Filed July 11, 1899. D. H. Hart, clerk.

33 *Defendant's First Supplemental Answer.*

Filed July 11, 1899.

In United States Circuit Court for Western District of Texas, July Term, 1899.

JAMES M. BELL
vs.
CITY OF LAMPASAS. } No. 2296.

Now comes the defendant in the above entitled and numbered cause, and, leave of the court being first had, presents this its first supplemental answer in reply to the plaintiff's first supplemental petition herein, filed on the — day of July, 1899, and says:

First. Defendant demurs to said first supplemental petition and says that the facts therein pleaded do not constitute or show any

reason why the matters pleaded by defendant are not a complete defense to plaintiff's action, and of this defendant prays the judgment of the court.

Second. And for special exception to so much of said supplemental petition as sets up the reorganization of the city of Lampasas under its special charter on March 19, 1890, and the abandonment of its special charter and the adoption of the Revised Statutes in lieu thereof by its city council and the addition of other territory thereto, the defendant says such organization and addition of territory could only be under articles 340, 516, 513, 503 of the Revised Statutes of the State of Texas of 1879, which articles are, as shown in defendant's amended answer herein, in violation of section 1 of 14th amendment to the Constitution of the United States. Further, the legislature had no right to delegate to any other body the right to repeal a general or special law; further, said articles of the Revised Statutes were in violation of section 56, article 3, of the constitution of the State of Texas, in that they authorized a city
34 council to repeal a special act of the legislature incorporating a city, and that said act, though in the shape of a general law, is a special act, and left the city council to determine whether the city council be governed by a special act or the general laws of the State, and by said articles the legislature attempts to regulate the affairs of cities.

Third. And for special exception to so much of said supplemental petition as pleads the validating acts therein mentioned the defendant excepts because said acts, as shown by the terms thereof, were not intended to and did not validate such acts and proceedings as those pleaded by plaintiff and defendant as having been done and had in 1883, whereby a city was attempted to be incorporated so as to include an existing city, especially after the organization of 1883 had been abandoned. If such validating acts had any effect as to defendant, then they only validated the acts of the city council in 1890 in adopting the Revised Statutes. Further, said validating acts could only validate an act which the legislature would have had power to authorize to be done, and the legislature would in 1883 have had no power to authorize the incorporation of a city including another city; and, further, said validating acts were, in effect, special acts, and therefore void.

And of each of said exceptions the defendant prays the judgment of the court.

Fourth. The defendant denies all and singular the allegations in said first supplemental petition contained, except in so far as the same are admissions of matters pleaded by defendant.

Fifth. Defendant specially denies that said bonds were issued in good faith, and says if they were so issued they were not sold in good faith. Contrary to the provisions of the ordinance printed on the back thereof, they were not sold for money, but, in order to fraudulently evade the provisions and restrictions in said ordinance, they were exchanged for said system of water works, worth much less than the par value of said bonds.

Wherefore this defendant says it is not liable on said bonds.

35 FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

Endorsed: No. 2296. James M. Bell *vs.* City of Lampasas. Defendant's first supplemental answer. Filed July 11, 1899. D. H. Hart, clerk.

Findings of Fact and Conclusions of Law.

Filed July 12, 1899.

In the Circuit Court of the United States, Western District of Texas, at Austin, July Term, 1899.

JAMES M. BELL
vs.
CITY OF LAMPASAS. } No. 2296.

Findings of fact and conclusions of law.

A jury having been waived by the parties and the cause submitted to the court upon an agreed statement of facts, which agreed statement of facts is as follows:

In United States Circuit Court for Western District of Texas, July Term, 1899.

JAMES M. BELL
vs.
CITY OF LAMPASAS. } No. 2296.

For the purpose of saving costs of witnesses we agree that the following are the facts in this cause and shall be treated as proven on the trial, but shall be considered only in so far as they are material to establish the allegations in the pleadings or relevant to the issues:

1. That the citizens of the city of Lampasas, in Lampasas county, Texas, were by special act of the legislature approved April 18th, 1873, granted a charter as a municipal corporation, under the name of the "corporation of the city of Lampasas," with boundaries containing an area of 553 acres, covering the original town plat
36 and a considerable area not laid out in regular blocks. In this special charter it was provided that the qualified voters should elect a mayor and board of aldermen, consisting of eight members, to hold office for the term of two years and until their successors should be elected and qualified; and it was further provided that the mayor and five aldermen should constitute a quorum for the transaction of business. It was also provided that the first election should be held within thirty days and on the first Monday in January of each alternate year thereafter by the mayor and three

aldermen. The act made no provision for dissolving the corporation, and no period of time was fixed for the expiration of the charter.

2. Under this special charter the said mayor and aldermen were granted power by ordinance, among other things, to construct water works, open, grade, and keep in repair the streets, build bridges, open sewers, to impose and collect taxes, not exceeding one per cent. per annum, and to issue bonds for public improvements. The mayor and aldermen were authorized to appoint a city marshal, who should also be *ex officio* assessor and collector of city taxes, and also to appoint a secretary and city attorney, but the office of treasurer nor any other officer than those named were — provided for.

3. That officers were elected and the said municipal goverment was exercised by them under the said special charter from 1873 until 1876, when a mayor and board of aldermen were elected who favored abolishing the said municipal government, and they, by formal resolution, decided to resign, and did so, and abandoned their said offices, and thereafter no steps were taken or action of any kind had under this special charter until March, 1890, after the decision of the supreme court of Texas in the case of Largen *vs.* The State of Texas, reported in 76th Texas Reports, page 323, hereinafter more fully referred to.

4. That the said city of Lampasas was in 1873 and has since continued to be the county-seat of Lampasas county, and had a
37 population in 1876 of about 800; that until the year 1882 the said town was without railroad facilities, when upon advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4,500 people, with street railroad and other improvements. About 1884 the population began to decline, and continued to decline until about 1890.

5. That at all times the business part of the town has been chiefly confined to the court-house square and streets leading out from it, and has been within the bounds of the said special charter, but during and since 1882 business houses were built near the railroad depot, outside of said bounds and outside of the present limits, but inside of the boundaries of 1883, and business has been since transacted therein.

6. That after the advent of the railroad numerous additions were laid out to the town and residences built thereon by persons doing business in the town, and continued to grow in population until it reached about 5,000 in 1884 and 1885, when the decline in population began.

7. That in February, 1883, a petition was presented to the county judge of said Lampasas county by more than fifty qualified voters living in and around the limits of said town, asking that an election be ordered to determine whether the persons living within the limits in said petition set out should incorporate as a city of more than one thousand inhabitants, under the provisions of the general laws of Texas as contained in title 17 of the Revised Statutes. Upon this petition the said county judge made his order and an election was held, resulting in a majority vote in favor of said incorporation,

some of those voting living inside and some outside of the limits prescribed by said special charter, and upon return thereof the said county judge, by proper order, declared the result of the said election and declared the said city duly incorporated within the limits in said petition set out, and which contained an area of 1,495 acres, embracing practically all of the lands included within the
38 said special charter, and extending nearly one-half mile west, north, and east thereof, to include the railroad depot.

8. That in pursuance of this incorporation a municipal government was organized, with all the officers prescribed in the general charter contained in said title 17, some of the aldermen and other officers residing outside of the limits prescribed by said special act, and exercised all the powers and functions of a city of over one thousand inhabitants, organized under the general laws of the State of Texas, levying and collecting taxes and prescribing and enforcing police regulations without any one contesting or disputing the validity of its lawful rights to act as such until November 4th, 1889, when upon the relation of a citizen and tax-payer the district attorney, himself also a resident tax-payer, filed an information in the nature of *quo warranto* against T. J. Largen, who was mayor, and all other persons assuming to act as city officers under this corporation by vote of the people, alleging that the said incorporation by vote of the people in 1883 was invalid because of the fact that the said special charter granted in 1873 had never been repealed, and that the action of the officers in resigning in 1876 was without effect, and praying that the said Largen and his associates be ousted from office and the said incorporation of 1883 be declared invalid.

9. That said suit was instituted by the said district attorney without any direction by the attorney general or other executive officer of the State and without making any of the creditors of said corporation parties, and upon trial resulted in a judgment ousting the said Largen and associates; which judgment on appeal was affirmed by the supreme court of Texas on the 31st day of January, 1890, and its opinion may be found in vol. 76, at page 323, of the official published reports of said court.

10. That after the decision of the supreme court affirming said judgment of ouster the said Largen and associates ceased to act, and upon an order for the election of mayor and alderman under the special charter of 1873, made by the county judge of Lampasas county, an election was held by persons living within the
39 limits of said charter on the 18th day of March, 1890, and the persons elected as mayor and aldermen met and organized March 19th, 1890, and on March 22nd, 1890, by unanimous vote of the city council, it was resolved to accept the provisions of "title XVII of the Revised Statutes of the State of Texas in lieu of the charter granted by the legislature," and a copy of this resolution was duly certified and recorded, as required by law, and said city at once assumed to act under the general charter provided in said title 17, and is now acting thereunder.

11. That on December 26th, 1890, by a vote of a majority of the resident citizens of the added territory hereinafter mentioned, there

was added to the limits of the city, as set out in the special charter of 1873, the greater part of the land west of the same, which was included within the limits of 1883, and one tier of blocks additional, since which time the said city government has assumed jurisdiction over said added territory, but has not assumed any jurisdiction over that part lying north and east of said original limits and which was included within the limits of 1883.

12. The area of the territory added in December, 1890, was 428 acres, which embraced the greater part of the residence property of the city outside of its original charter limits of 1873.

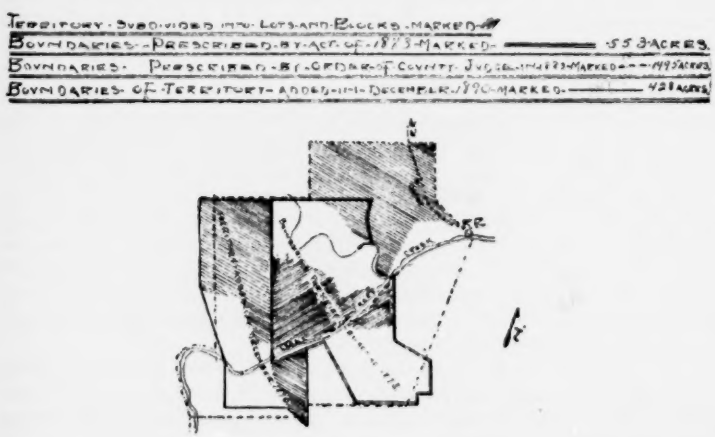
13. That the said territory lying north and east of said original limits, and which was within the limits of the charter of 1883 as adopted by the vote of the people, has situated thereon seventy-seven residence houses, occupied by persons ninety per cent. of whom follow some kind of business within the town as defined by charter limits of 1873. The following map shows the boundaries prescribed by act of 1873, the boundaries defined in the order of the county judge in 1883, the boundaries of the territory added in December, 1890, the territory subdivided into lots, blocks, etc.:

Territory subdivided into lots and blocks, marked .

Boundaries prescribed by acts of 1873, marked , 553 acres.

40 Boundaries prescribed by order of county judge in 1883, marked , 1,495 acres.

Boundaries of territory added in December, 1890, marked , 428 acres.


TERRITORY SUBDIVIDED INTO LOTS AND BLOCKS MARKED
BOUNDARIES PRESCRIBED BY ACT OF 1873 MARKED
BOUNDARIES PRESCRIBED BY ORDER OF COUNTY JUDGE IN 1883 MARKED
BOUNDARIES OF TERRITORY ADDED IN DECEMBER 1890 MARKED
553 ACRES
1495 ACRES
428 ACRES
CREEK
CREEK

14. All the books and papers of the city government of the city of Lampasas, under the charter of 1873 and 1883, were lost and could not be found, except the assessment-rolls for the year 1889, from which it appears that the assessed values of all lands within the city limits of 1889 was $664,429.00, and that the personal property was about $400,000.00, and that the said assessment was di-

vided as follows as to the lands, no division being shown as to personal property, viz: Within old limits of 1873, $452,444.00; within the part added in December, 1890, $157,915.00; and within the parts north and east, $68,970.00.

41 15. The said rolls show the names of 438 voters, divided as follows, viz: Residing within old limits of 1873 were 175; residing on part added in December, 1890, 167; residing on parts north and east, 96.

16. In January, 1885, the city council of said city of Lampasas, elected under the provisions of the general charter contained in title 17 aforesaid, and assuming to act thereunder and not under the provisions of the charter of 1873, in good faith and in response to a general demand of the business men of the city for fire protection and to furnish water to the city, then having a population of about 4,500, determined to build a system of water works for the city and to pay for the same with the proceeds of sale of bonds of the city, and to this end, after full and open discussion, did pass ordinances to the following effect, viz:

Ordinance No. 59.

Printed on back of bond.

An ordinance to be entitled An ordinance to provide for the issuance of water-works bonds of the city of Lampasas, and to provide for payment of the interest and sinking fund of said bonds.

SECTION 1. Be it ordained by the city council of the city of Lampasas, That the mayor of said city be, and he is hereby authorized and required to have engraved or printed coupon bonds of the city of Lampasas, with semi-annual interest coupons attached, falling due on the first days of January and July of each and every year from and after their date, at the rate of seven per cent. per annum interest; said bonds to be styled "Lampasas city water-works bonds."

SEC. 2. Said bonds shall be drawn to mature at fifty years from date of issuance, with the option reserved to the city council to redeem and retire ten thousand dollars of the principal of said bonds at the end of ten years from the date of issuance of said bonds, and to redeem and retire five thousand dollars of the principal of said bonds at the end of each period of five years from and after said ten years from date of issuance.

42 SEC. 3. Said bonds shall be issued to the amount of forty thousand dollars ($40,000) or so much thereof as may be necessary, shall be dated at the time of issuance, and shall bear interest from said date of issuance.

SEC. 4. Said bonds shall, at the time of their issuance, be dated and signed by the mayor, countersigned by the city secretary, and registered by the city treasurer.

SEC. 5. The city secretary and the city treasurer shall each keep a record of the number, date of issuance and amount of said bonds, and the number, amount and date of maturity of the coupons thereto

attached, and shall endorse the countersigning and registration thereof on each of said bonds.

SEC. 6. Said bonds shall be issued in sums of one thousand dollars each, payable to bearer, and the principal and interest thereon shall be payable at S. M. Swenson & Sons' bank, New York city, or at the office of the city treasurer, in Lampasas, the interest being payable semi-annually on the coupons attached.

SEC. 7. For the purpose of providing for the payment of the interest on said bonds, and to provide a sinking fund for the redemption of the same, a special ad valorem tax of twenty-five cents on every one hundred dollars' worth of property is hereby levied and ordered to be, assessed and collected for the year 1885, and for each and every year thereafter until said bonds, principal and interest, are paid, on all property subject to taxation within the city of Lampasas, and rendered to and assessed by the city assessor and collector; provided, however, that the city council shall, from time to time, make a proportionate reduction in the amount of the tax hereby levied, whenever the whole amount of said tax shall not be necessary, to meet the interest and sinking fund on the bonds of this issue then outstanding.

SEC. 8. To further provide funds for the payment of said interest and sinking fund there is hereby appropriated out of the revenues of the city, arising from the net earnings of the water works, 43 a sufficient sum annually, beginning with the year 1885, to make up the deficiency (if any there be) of said interest and sinking fund, after the collection of the special tax herein provided for, and the sums arising from the net earnings of the water works shall not be drawn upon or disbursed for any other purpose until said interest and sinking fund *is* fully provided for in each year, and the city treasurer shall keep a separate account of all moneys derived from said tax and net earnings of water works, to be known and designated on his books and reports as the "Water-works fund."

SEC. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable, the city council may designate by an order entered of record on the minutes, the numbers and amount of the principal (not exceeding $10,000) and date of payment of such bonds of this issue as the city desires to redeem, said numbers being designated by lot or otherwise, as the council may then determine, provided the numbers designated are consecutive, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice, personally or otherwise, may be given to the holder of such designated bonds, their agents or representatives, as the council may determine at the time of such designation, and such designated bonds shall be paid upon presentation, and shall cease to bear interest from and after the date of payment fixed by said order; and at the end of each period of five years thereafter, five thousand dollars ($5,000) of the principal of said bonds may be redeemed in like manner.

SEC. 10. The bonds herein provided for shall be sold at not less than par, and in such manner as is or may be hereafter provided

by ordinance, resolution or otherwise, and the proceeds of said bonds shall be devoted exclusively to the construction of a suitable system of water works for fire protection, family supply and other public and private purposes, and for the *purpose* of such fire-department supplies as may be deemed necessary by the council, said system of water works to be operated in such manner as may
44 be hereafter provided by ordinance, resolution, or otherwise.

Filed January 6th, 1885.

S. S. POTTS, *Secretary.*

Passed January 6th, 1885.

S. S. POTTS, *Secretary.*

I approve the above ordinance January 6th, 1885.

W. J. STANDEFER,
Mayor of City of Lampasas.

Attest: S. S. POTTS, *Secretary.*

Ordinance No. 60.

Printed on back of the bond.

An ordinance to be entitled An ordinance to provide for the collection of a special tax for the payment of interest and to provide a sinking fund for the redemption of water-works bonds of the city of Lampasas.

SECTION 1. Be it ordained by the city council of the city of Lampasas, That the city assessor and collector be and he is hereby required to assess and collect a special tax of twenty-five cents on the one hundred dollars' worth of all property, subject to taxation within the city of Lampasas, rendered to and assessed by him for the year 1885, and for each and every year thereafter, for the payment of the semi-annual interest and to provide a sinking fund for the redemption of the water-works bonds of the city of Lampasas, until said bonds, principal and interest, are paid; provided, however, that the city council shall from time to time make a proportionate reduction in the amount of the tax hereby levied, whenever the whole amount of tax shall not be necessary to meet the interest and sinking fund on the bonds then outstanding.

Filed January 6th, 1885.

S. S. POTTS, *Secretary.*

45 Passed January 6th, 1885.

S. S. POTTS, *Secretary.*

I approve the above ordinance January 6th, 1885.

W. J. STANDEFER,
Mayor of City of Lampasas.

Attest: S. S. POTTS, *Secretary.*

Ordinance No. 65.

Printed on the back of the bonds.

An ordinance to be entitled An ordinance to amend section 9 of ordinance No. 59, passed and approved January 6th, 1885.

SECTION 1. Be it ordained by the city council of the city of Lampasas, That section 9 of ordinance No. 59, passed and approved January 6th, 1885, be so amended *so* as to read hereafter as follows:

SEC. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable, the city council may designate by an order entered of record of the minutes, the numbers and amount of the principal, not exceeding $10,000.00 and date of payment of such bonds of this issue as the city desires to redeem, said numbers so designated shall be consecutive, beginning at No. 1, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice, personally or otherwise may be given to the holder of such designated bonds, their agents or representatives as the council may determine at the time of such designation, and such designated bonds shall be paid upon presentation, and shall cease to bear interest from and after date of payment fixed by said order; and at the end of each period of five years thereafter, five thousand ($5,000.00) of the principal of said bonds may be redeemed in like manner.

SEC. 2. That this ordinance take effect and be in force from
46 and after its passage.

Passed March 21st, 1885.

Approved March 21st, 1885.

W. J. STANDEFER, *Mayor.*

Attest: S. S. POTTS, *Secretary.*

17. Section 12 of said charter of 1873 is as follows: "Section 12. All ordinances and resolutions enacted by said corporation shall be published by posting notice at three public places in the limits of the corporation, or by publication for at least three successive weeks in a newspaper published within the limits of said city."

18. The city council that passed said ordinances above recited was composed of the mayor and five aldermen, all of whom were elected by a general vote of the entire corporation within the limits of the charter under the incorporation of 1883. Two of the said aldermen and the city secretary resided in the territory outside of the charter limits of 1873, and one of said two aldermen resided in the territory northeast of said limits and outside of the present city limits.

19. After the adoption of the ordinances as aforesaid, the said city council advertised for bids for the construction of a system of water works, and personally inspected similar water works in neighboring towns, and also tried to negotiate a sale of bonds for cash. Failing to effect a sale of bonds by the time set for receiving the

bids, the letting of the contract was postponed; at this time several bidders were ready to submit plans and bids, but as all contemplated being paid in cash, no bids were made or received. There was present at this time, prepared to submit a bid, a responsible party, willing to build a system of water works for $25,000 in cash, but it is not now known what kind of a system of water works this party intended building as to the size of the mains, pumps, standpipes, or other details, or whether he proposed to build as
47 good a system as was subsequently built, the fact being that this bidder demanded cash payment and was unwilling to take bonds in payment.

20. At a later date the said city council awarded the contract to a bidder who was willing to build a system according to his plans at the price of forty thousand dollars, to be paid in bonds of the said city, and this contractor proceeded to build the said system, and the same was fully tested by the city council before acceptance, and upon such test and approval the said works were accepted and paid for by the delivery by the city council of the bonds as called for in the contract. The city officers paid for the water works in bonds because they had been unable to sell the bonds for money. The bonds were not considered good for their face value; if they had been so considered, the water works could have been constructed for less.

21. The said system of water works as built was worth, at cash values based upon cost of construction, the sum of $26,279.00 without allowing anything by way of profits to the contractor.

22. Said bonds so issued by defendant in payment were in words and figures as follows:

STATE OF TEXAS.

Lampasas City Water-works Bond.

The City of Lampasas

will pay one thousand dollars to bearer, fifty years after date hereof, with interest from date at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July, in each year, payable at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office in the city of Lampasas, on presentation of the proper coupon hereto attached.

Issued under authority of an ordinance entitled "An ordinance to provide for the issuance of water-works bonds of the city of Lampasas, and to provide for the payment of the interest and sinking fund of said bonds," passed January 6th, 1885; a copy of which ordinance is printed on the reverse side hereof, to which ref-
48 erence is made.

Witness the hand of the mayor of the city of Lampasas, attested by the city secretary, with the corporate seal affixed, in the

city of Lampasas, State of Texas, this twenty-seventh day of March, A. D. 1885.

W. J. STANDEFER, *Mayor.*

Attest:

[SEAL.] S. S. POTTS, *Secretary.*

In the upper left-hand corner, in transverse form, and separated from the body of the bond by vignette line, was the following:

"—— ——, comptroller, State of Texas."

"S. S. Potts, secretary, city of Lampasas."

"W. S. Morris, treasurer, city of Lampasas."

On the back of said bonds was the following endorsement:

"Registered March 28, 1885.

WM. J. SWAIN, *Comptroller.*"

But no seal was affixed to such signature or indorsement. On the back of this bond *was* printed copies of the ordinances under which it was issued, as hereinbefore set out.

23. The records of the office of the comptroller of the State of Texas show that on March 28th, 1885, there were duly registered forty bonds of the city of Lampasas, of the denomination of one thousand dollars each, as water-works bonds, and when said bonds were tendered for registration there was filed in said comptroller's office a statement, made by W. J. Standefer, mayor, and S. S. Potts, secretary, of the city of Lampasas, certifying that the assessed value of all property situated within the limits of said city of Lampasas, as shown by the tax-rolls for the year 1884, was $1,447,200.00.

24. Plaintiff is the holder and owner of the 102 coupons mentioned in his petition, each of the sum of thirty-five dollars, and maturing at the different dates set out in his petition; which
49 said coupons, except as to due date and number of bond, are of the following form:

"$35. The City of Lampasas $35.

will pay the bearer thirty-five dollars at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office, in the city of Lampasas, on the 1st day of ——, 189–, being six months' interest on bond No. —.

S. S. POTTS, *Secretary.*"

Of which coupons, 42 in number, being numbers 9 to 15, inclusive, on bonds Nos. 8 to 13, inclusive, became due more than four years before the institution of this suit, and if plaintiff is entitled to recover in this action he is entitled to recover the sum of $2,100 principal and $452.70 interest, due on the remaining sixty coupons mentioned in his petition.

25. At the time of the affirmance of the judgment in Largen *vs.* State, 76 Texas, 323, one H. E. Hediman was in charge of the water works so acquired for said bonds, he having taken charge of said water works as superintendent before the dissolution of said organization of 1883. He held possession of said water works under a

claim for one hundred and fifty dollars' back salary due him for the dissolved organization, and for some other monies due him for a house placed on the water-works grounds. Asserting such claim, he remained in charge of such water works for over one year from the dissolution of said corporation of 1883. He delivered possession of said water works to Coler & Bro., bankers and brokers of New York city, through their agent, W. L. Vining, for the reason that Coler & Bro. paid him the debt due him for his interest in said house, said Vining at the time exhibiting to him one of said bonds of said series, and stating that said Coler & Bro. owned it and all other bonds of said series, and said Coler & Bro. and their assigns have from that time controlled and claimed to own said water works, and still control and claim to own said system of
50 water works. The bond exhibited to said Hedeman by Vining was not one of the number from which any of the coupons in suit were taken, nor did said Coler & Bro. own or represent any of the owners of the bonds from which the coupons in suit were taken. Said Hedeman did not pretend to act for the city of Lampasas in making said settlement, and only assumed to act in the protection of his own claim, and plaintiff refused to act with Coler, and has had no connection with him in any way.

26. Since the reorganization of the city government in 1890 under the special charter of 1873 and the general charter adopted immediately thereafter the city of Lampasas has exercised no control over said water works, but has paid monthly, first to said Hedeman and then to Coler & Bro., for the use of water supplied by said water-works system, and since said reorganization in 1890 said city of Lampasas has not taken possession of any other property within its limits that was acquired or constructed between 1883 and 1890, except one bridge built prior to 1890, but which was not paid for, but which on account of such non-payment was taken possession of by the builders and sold by them to the county of Lampasas and the city as organized in 1890.

27. The pumping station of the water works as originally constructed was situated within the corporate limits as defined in the charter of 1883, but was removed by the city in 1887 to a point without the corporate limits of 1883, and has remained at said place ever since. The stand pipe was located at a point near the west line of the charter limits of 1883, within such limits, and the distributing water mains leading from such stand pipe were distributed through the part of the city west of the original charter limits of 1873, thence through the business part of the city within said original limits and extending eastward and northward to the railroad depot, and said stand pipe and all of said distributing mains and fire-hydrants are within the limits of the city as now existing
51 (composed of the original charter limits and the territory added in 1890), except that for a distance of about 900 yards one of said mains extended northward to said depot with one fire-hydrant thereon.

28. There has at all times been a well-defined business center in the city of Lampasas, which is within the limits of the charter of

1873, and between 1883 and 1890 a number of business houses and residences were established in the neighborhood of the railroad depot, all of which were in the limits of the charter of 1883, but are not within the limits over which the present city government assumes jurisdiction. Within this territory there are seventy-seven inhabited dwellings and two vacant dwellings. Of the persons occupying these dwelling-houses ninety per cent. did business within the present limits of the city.

29. The majority at the election held in 1883 to determine whether the city of Lampasas should be incorporated under the general laws was 85, and at that time the population within the boundaries sought to be incorporated was four or five thousand.

30. No interest was paid on the bonds described in plaintiff's petition after 1889; but this agreement shall not be deemed a waiver of defendant's plea of limitation, nor be used to defeat such plea.

31. That between 1885 and 1889 there was a great depreciation in property values and decrease in population in the original limits of the city of Lampasas, in that part thereof added to the city in 1890, and in that part of the city organized in 1883 that is not included in either the original limits of 1873 or in that added in 1890, but such decrease and depreciation was greater in that part not in either said original limits or said territory added in 1890 than it was in other portions of the territory organized by the proceedings in 1883, the least decrease and depreciation being in the limits prescribed by the act of 1873.

32. Prior to the institution of this suit no other suit had been instituted against defendant on any part of the bonds mentioned in plaintiff's petition as having been issued by defendant or
52 on any of the coupons thereof, and none of the said coupons have been paid except those maturing prior to the year 1890, and since the year 1889 no tax has been levied by the city of Lampasas for the purpose of paying the interest on said bonds or providing a sinking fund.

33. The plaintiff in 1887 obtained the bonds the coupons of which are sued upon from the estate of his father, who had purchased them from Nelson & Noel, brokers, of Saint Louis, Missouri.

34. In 1892 the city of Lampasas decided, by vote in accordance with the statute, to take charge of the public schools, and by another vote, in accordance with the statute, decided to levy a tax to maintain such schools, and in the fall of 1893 decided to build a public school building, and in November and December, 1893, and January, February, and March, 1894, the matter was under discussion, and during those months W. B. Abney, Esq., an attorney at Lampasas, was engaged in preparing ordinances to be passed for the issuance of bonds to obtain money to build the public school building, corresponding with the attorney general and comptroller in regard to the form of such bonds and ordinances and negotiating for the sale of said bonds, and, ordinances having been enacted authorizing the issuance of said bonds which were satisfactory to the comptroller and attorney general, said bonds were issued, bearing

date of January 1st, 1894, though not in fact put in circulation until April, 1894, they having been registered by the comptroller on April 2nd, 1894, the amount of bonds so issued being $18,000, bearing six per cent. interest, all of which (except $500) are still outstanding and on which the interest has been paid regularly. At the time of the said registration by the comptroller the statement of the city officers, as required by the law, showing the assessed values of the property in said city and a statement that the city then had no bonds outstanding except about $1,500, which it had issued in payment for a bridge in 1893, was filed with said comptroller. It was not shown that the plaintiff Bell had any knowledge of the issuance of these school bonds or the issuance of any other bonds
53 by the defendant at any time before the filing of this suit.

35. In the latter part of December, 1893, the plaintiff visited Lampasas and had one or more conversations with W. B. Abney, Esq., and was negotiating with him with a view of employing him to institute a suit to collect the amount due upon his bonds, and in conversing with Mr. Abney the question of the liability of the officers who issued the bonds was discussed, also that — F. O. Brown, the contractor who received them, and that of Nelson & Noel, the Saint Louis brokers from whom his ancestor had bought them. No agreement was reached between plaintiff and Abney, and plaintiff left and did not thereafter take any steps to enforce payment upon his bonds against any one until this suit was brought.

36. With the proceeds of the sale of said bonds issued in 1894 a public school building was built, and at the time of the issuance thereof the officers of the city of Lampasas did not believe that the bonds described in plaintiff's petition were valid obligations against the city, and therefore the said statement was made to the comptroller to the effect that in January, 1894, the said city had no outstanding bonds.

WEST & COCHRAN,
Attorneys for Plaintiff.
MATTHEWS & BROWNING,
FISET & MILLER,
Attorneys for Defendant.

And the court adopts as and for its conclusions of fact the foregoing agreed statement of facts, upon which the cause was tried, and finds the following additional conclusion:

From the facts agreed upon by the parties, as above set out, the court concludes that within the city of Lampasas, as now organized and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them
54 as a valid city government from its adoption until the *quo warranto* proceeding against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons

residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same.

Conclusions of Law.

1. The coupons in suit constitute a valid and existing liability against the present city of Lampasas, except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation, and the remaining 60 coupons sued upon, not being barred by the statute, are valid, and the defendant should be required to pay the same. Shapleigh *vs.* San Angelo, 167 U. S., 646; City of Lampasas *vs.* Talcott, decided by circuit court of appeals, 5th circuit, on the — day of ——, 18—.

2. Judgment is therefore rendered in favor of the plaintiff against the defendant, The City of Lampasas, for the sum of $2,552.70, with interest thereon, at the rate of six per cent. per annum, from the date hereof, and all costs of suit. To the judgment rendered and the additional conclusion of fact the defendant in open court excepts.

T. S. MAXEY, *Judge.*

Endorsed: No. 2296. James M. Bell *vs.* City of Lampasas. Findings of fact and conclusions of law. Filed July 12th, 1899. D. H. Hart, clerk.

Stipulation Waiving a Jury.

Filed July 11th, A. D. 1899.

U. S. Circuit Court, Western Dist. of Tex., at Austin, July Term, 1899.

JAMES M. BELL
vs.
CITY OF LAMPASAS. } No. 2296.

55 It is hereby agreed by and between the parties, plaintiff and defendant, that a jury be, and is hereby, waived, and that all matters of fact as well as of law be submitted to the court.

WEST & COCHRAN,
Att'ys for Plaintiff.
MATTHEWS & BROWNING AND FISET & MILLER,
Att'ys for Defendant.

Endorsed: No. 2296. James M. Bell *vs.* City of Lampasas. Stipulation waiving a jury. Filed July 11th, A. D. 1899. D. H. Hart, clerk.

Judgment.

Entered July 12th, 1899.

In the Circuit Court of the United States for the Western District of Texas, Austin Division.

JAMES M. BELL
vs.
THE CITY OF LAMPASAS. } No. 2296.

WEDNESDAY, *July 12th*, 1899.

And now, on this day, this cause being duly reached on the docket and called for trial, come the parties, plaintiff and defendant, by attorneys, and upon request are granted leave respectively to file amended and supplemental pleadings; and thereupon comes on to be considered the demurrers and exceptions of defendant, and, the same being heard and understood, it is ordered that each and all of said demurrers and exceptions be overruled except special exception No. one (1), interposing the bar of the statute of limitation to plaintiff's coupons numbers nine (9) to fifteen (15), inclusive, which is sustained; and to the order overruling its said demurrers and exceptions the defendant duly excepted and asked that
56 its exceptions be noted in the record, which is accordingly done. The parties thereupon announced ready for trial on the merits, and by written stipulation waive a jury and submit the matters in controversy to the court upon an agreed statement of facts, which is made a part of the findings of fact by the court herein; and the court, having heard the pleadings and the evidence as contained in said agreed statement, and argument of counsel, by request of parties files its findings and conclusions of fact and law, and thereon renders judgment for plaintiff against defendant for $2,552.70, being the amount of principal and interest due upon the sixty coupons sued upon which are not barred by the statute of limitation.

It is therefore considered and adjudged by the court that the plaintiff, James M. Bell, do recover against the defendant, The City of Lampasas, the said sum of two thousand five hundred and fifty-two and $\frac{70}{100}$ dollars, together with all costs in this behalf expended, for which let execution issue in terms of the law, and this judgment shall bear interest from its date at the rate of six per centum per annum.

To said findings and conclusions of fact and law when announced and to the judgment of the court thereon as rendered the said defendant duly excepted and asked that its exceptions be noted in the record, which is accordingly done.

Bill of Exceptions of the Defendant.

Filed July 12, 1899.

In the Circuit Court of the United States, Western District of Texas, at Austin, July Term, A. D. 1899.

JAMES M. BELL
vs.
THE CITY OF LAMPASAS. } No. 2296.

Be it remembered that on the trial of the above entitled and numbered cause the court having filed its conclusions of fact
57 and law, made a part of the record in this cause, and announced that judgment would be rendered in favor of plaintiff, as prayed for in plaintiff's petition, and to which conclusions of law and judgment the defendant in open court then and there excepted generally and specially, because the said conclusions of law and judgment were not warranted by the conclusions of fact as found by the court, in this, that:

1st. The organization of 1883, under which the bonds sued on were issued, was not voidable, but wholly void; had neither a *de jure* or *de facto* existence, and the bonds could have no validity for any purpose.

2nd. If the organization of 1883 be granted to be voidable only, then the bonds were void, because the ordinances under which they were issued did not provide for the sale and delivery of the bonds, and the conclusions of fact do not show that any one was authorized to sell and deliver the bonds.

3rd. The bonds were not registered by the city treasurer, as required by the ordinance under which they were issued, nor was the certificate of the comptroller of the State of Texas or of the city treasurer of the city of Lampasas indorsed on the bonds, as was necessary to give them any validity.

4th. It appears that the bonds were not sold and the proceeds used in payment for the system of water works, as provided by said ordinance, but that the bonds were traded at less than par for the water works, which was contrary to the provisions of the said ordinance, and, further, that this trade was made in order to evade the provisions of the ordinance, and the failure to have said certificates of the comptroller of the State and the city treasurer endorsed on said bonds charged the holders thereof with notice that said bonds had been illegally issued and traded for said water works in order to evade the provisions of said ordinance, even if it did not absolutely invalidate the bonds.

5th. If the organization of 1883 was a *de facto* organization, so that the bonds issued by it would be legal obligations against
58 that corporation and the inhabitants thereof, the conclusions of fact show that the present city of Lampasas—that is, the defendant in this case—was not when the organization of 1883 was

dissolved, in 1889, and is not now the same corporation as the city of Lampasas organized in 1883; did not and does not embrace the same inhabitants or territory substantially, and is not therefore liable for the debts of the corporation of 1883; and, further, the conclusions of fact show that the present city has not acquired any of the property that belonged to said city of Lampasas as organized in 1883.

6th. The City of Lampasas, defendant in this suit, was incorporated in 1873 and has existed as a municipal corporation continuously up to this time and has been a separate and distinct municipal corporation from the city of Lampasas as attempted to be organized in 1883, and if the bonds are in any respect valid obligations as against the municipal corporation called the city of Lampasas, organized in 1883, they are not obligations against this defendant.

7th. The conclusions of fact show that the officers who issued the said bonds were not either *de jure* or *de facto* officers of defendant.

8th. The conclusions of fact show that, even if it be held that the bonds were issued by defendant acting under its charter of 1873, they are invalid, because they were issued before the ordinances authorizing their issuance had taken effect, as defendant's charter required publication of all ordinances for three weeks, and the bonds were issued within six days of the time of the enactment of the last ordinance.

9th. The conclusions of fact show that, even if it be held that the bonds were issued by defendant while acting under its charter of 1873, they are invalid, because the assessed value of all property within the boundaries prescribed by said charter at the time of the issuance of the bonds was such that a levy therein of a tax of 25 cents on each one hundred dollars in value thereof would not raise enough money to pay the interest on an issue of $40,000 of
59 bonds at the rate of 7 per cent. per annum and created a sinking fund of two per cent.

10th. If said ordinances passed under the circumstances which the findings of the court show them to have been passed are enforced as now sought to be enforced and said bonds are held to be binding obligations of this defendant, then the necessary result thereof will be that the tax-payers residing within or owning property within defendant's boundaries as fixed by the special charter of 1873 will de de-rived of their property without due process of law and in violation of sec. 1 of the fourteenth amendment to the Constitution of the United States.

11th. The said conclusions of fact show that the pretended organization of 1883 was formed under the provisions of chapters 1 and 11 of the Revised Statutes of 1879 and amendments thereto, by which Revised Statutes the right of taxation was conferred on municipal corporations, said chapters 1 and 11 of the Revised Statutes of the State of Texas and said acts amendatory thereof being in violation of sec. 1 of the fourteenth amendment of the Constitution of the United States, in that they provide for the formation of municipal corporations, with power to levy taxes on property therein,

with boundaries not fixed by the legislature or by any body or tribunal before whom the residents of the territory proposed to be incorporated could be heard.

12th. The conclusions of fact show that after the decision of the case of Largen *vs.* The State, in January, 1890, no holder of any of said bonds has ever asserted any right to recover of defendant on said bonds until the institution of this suit, but such holders have acquiesced in the principles of law decided in said cause, knowing that defendant and its inhabitants treated said decision as establishing the invalidity of said bonds, and therefore had not, in 1890 or since, taken possession of said water works, and the plaintiff, during all that time, by acts and words, induced the defendant to believe he had abandoned any rights he might have as a holder of said bonds, whereby defendant was induced to materially
60 change its condition by issuing other bonds and contracting other debts in making other public improvements; which bonds and debts would not be valid if said bonds sued on were valid obligations of defendant, and the holders thereof would be materially injured in their rights, acquired under the belief that plaintiff had so abandoned the rights claimed by him under the bonds sued on.

And the court thereupon overruled all of said exceptions and rendered judgment, as prayed for by the plaintiff, in the terms as shown in the judgment forming a part of the record of this cause; to which rulings, conclusions of law, and judgment of the court the defendant then and there in open court excepted, and now the defendant tenders this its bill of exceptions in open court during the time required by law to the judge of the court for his allowance and signature, and the said bill is now here in open court allowed, signed, and ordered to be filed and constitute a part of the record in this cause.

This the 12th day of July, A. D. 1899.

T. S. MAXEY, *Judge.*

Endorsed: No. 2296. James M. Bell *vs.* The City of Lampasas. Bill of exceptions of the defendant. Filed July 12, 1899. D. H. Hart, clerk.

Assignment of Errors.

Filed July 14, 1899.

In Circuit Court of the United States, Western District of Texas, at Austin, July Term, 1899.

JAMES M. BELL *vs.* CITY OF LAMPASAS. } No. 2296.

Now comes The City of Lampasas, the defendant in the above-entitled and numbered cause, by its attorneys, and assigns the following errors:

61 1st. The court erred in overruling the defendant's general demurrer and its 8th special exception to plaintiff's amended

petition. This was erroneous because the only legitimate inference to be drawn from said petition is that it seeks to recover from defendant as a municipal corporation attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, no special statute being pleaded, which general laws relative to the formation of municipal corporations and the levy and collection of taxes thereby are in conflict with section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations are not fixed by the legislature, nor does the law make any provision by which said boundaries can be fixed by any tribunal before which the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the corporation.

2nd. The court erred in overruling the defendant's second exception to plaintiff's 1st supplemental petition. This ruling was erroneous because the adoption by the defendant of the Revised Statutes in March, 1890, in lieu of its special charter and the annexing of additional territory, as pleaded by plaintiff in his said 1st supplemental petition, did not have any effect on said special charter, deprive defendant thereof, or add any territory to the boundaries fixed in said special charter for the following reasons, viz:

I. Articles 340, 506 to 513, and 503, embraced in title XVII of the Revised Statutes of 1879 of the State of Texas, under which said adoption of the Revised Statutes was made and additional territory added, are in violation of sec. 1 of the 14th amendment to the Constitution of the United States for the same reasons as stated in the preceding assignment of error.

II. Said articles of the Revised Statutes are in conflict with section 56, article 3, of the constitution of the State of Texas in that
62 they are part of an act of the legislature, which is a special act, though in the form of a general law, authorize a city council to repeal a special act of the legislature incorporating a city, leave a city council to determine whether it shall be governed by the special act creating the city or the general laws of the State, and are attempts to regulate the affairs of cities.

3rd. The court erred in overruling the defendant's third exception to plaintiff's first supplemental petition wherein the plaintiff pleaded the validating acts of the legislature, passed after the year 1890, as curing irregularities in the charter of 1883. Said ruling was erroneous for the following reasons, viz:

I. Said validating acts were not intended to, did not purport to, and did not validate such proceedings as those pleaded by plaintiff and defendant as having been done and had in 1883, whereby a city was attempted to be incorporated so as to embrace within its boundaries, with other territory, an existing city.

II. Said validating acts attempt to validate acts done or attempted to be done under said articles of the Revised Statutes relating to municipal corporations, which were in violation of section 1 of the

14th amendment to the Constitution of the United States for the reasons as stated in the 1st assignment of error herein.

III. Said validating acts were in effect special acts, and therefore void.

4th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon because the organization formed in 1883, under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable but wholly void for the reason that such organization was attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, which general laws of the State of Texas then in force and embraced in title XVII of the Revised Statutes of 1879, relating to the formation of municipal corporations and the levy and collection of taxes thereoy, were in violation
63 of the section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed or to be fixed by the legislature, nor do said statutes make any provision by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation.

5th. The court erred in its conclusions of law and the judgment rendered thereon because the general laws of the State of Texas under which said organization of 1883 was attempted to be formed are in conflict with the section 56, article 3, of the constitution of the State of Texas, in that, though in the form of a general law, they constitute in effect a special act, authorize a city council to repeal a special act of the legislature incorporating a city, leave the city councils of a certain class of cities to determine whether they will be governed by a special act creating the city or by the general laws of the State, and are attempts to regulate the affairs of a certain class of cities.

6th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon because the defendant was incorporated as a city by a special act of the legislature in 1873, which fixed its boundaries, and it has continued ever since as a municipality without any change in its charter until 1890, and that the attempted organization of a municipal corporation in 1883 under the general laws of the State (even conceding said law to be constitutional) including nearly three times as much territory as was included within the boundaries described in said special act, not by the inhabitants of defendant, but by a majority of the inhabitants of such larger territory, a majority of such inhabitants residing outside of defendant's limits, was without authority of law, null, and void, and did not destroy or effect the corporate existence of defendant.

7th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment thereon because if the organiza-
64 tion of 1883 was a *de facto* corporation, so that the bonds issued by it would be obligations against that corporation or

the inhabitants thereof, the conclusions of fact show that defendant was not, when said bonds were issued or when the organization of 1883 was dissolved or abandoned in 1889, and is not now, the same corporation as that attempted to be formed in 1883 under defendant's name, did not and does not embrace the same inhabitants, territory, or property substantially, is not the successor thereof, and has not at any time received or acquired any property that may have belonged to said organization of 1883, so that if said bonds are in any respect valid obligations as against the municipality called the city of Lampasas, organized in 1883, they are not obligations on which defendant is liable.

8th. The court erred in its conclusions of law and the judgment rendered thereon because there cannot be a *de facto* corporation, including within its boundaries the greater part of the inhabitants and territory of an existing legal municipal corporation, a large amount of other territory, and a large number of other inhabitants, with power to bind by its contracts or acts such existing legal municipality.

9th. The court erred in its conclusions of law and its judgment rendered thereon because the persons who, as officers of said organization of 1883, issued said bonds and passed the ordinances authorizing the issuance of same were not the officers of defendant, were not the same officers as were by defendant's charter authorized to pass ordinances and issue bonds, were not when they passed said ordinances and issued said bonds assuming or pretending to act as the officers of this defendant, and were therefore not *de facto* officers of defendant.

10th. The court erred in its conclusions of law and the judgment rendered thereon because when the illegal organization of 1883 was abandoned in 1889, having within its boundaries 438 tax-paying voters and an area of 1,495 acres, its liabilities did not become the liabilities of defendant, which then had only 175 tax-paying
65 voters and an area of 553 acres, and not then being liable, the defendant did not become bound for said liabilities in December, 1890, when it attached 428 acres out of the 942 acres of the territory of the organization of 1883, not included within defendant's boundaries.

11th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon because at the time of the issuance of said bonds the only legal existing city was the defendant, with the boundaries fixed by its charter of 1873, and at that time the property within such boundaries did not exceed in value the sum of one million dollars, and the levy and collection of a tax of 25 cents on each one hundred dollars in value of the property within said boundaries would not then or at any time since produce enough revenue to pay the interest on the bonds mentioned in plaintiff's petition and create a sinking fund of at least two per cent., and such issuance of bonds was therefore illegal, as being in violation of section 9 or article 9 and section 7 of article 11 of the constitution of the State of Texas, and no subsequent change in de-

fendant's boundaries or increase in its territory or taxable property would render such bonds valid.

12th. The court erred in its conclusions of law and the judgment rendered thereon because the city treasurer did not endorse on said bonds his registration thereof, as required by the ordinances by virtue of which they were issued, and which ordinances were printed on the backs of the bonds, nor did the comptroller of the State of Texas endorse thereon his certificate of registration thereof, authenticated with his official seal, as required by the statutes of the State of Texas. These certificates were necessary in order to give the bonds validity, or, if not necessary in order to give them validity, the want of such certificates of registration destroyed the negotiability of the bonds and charged the purchasers thereof with notice of the facts found by the court that the bonds were not
66 sold at par and the proceeds used in the construction of a system of water works, as required by said ordinances, but, upon the contrary, the whole issue of $40,000 of bonds was traded for a system of water works worth much less than that sum, and that this was done to evade the provisions of said ordinances, and because said bonds were issued before one of the ordinances authorizing their issuance and printed on the back thereof had taken effect.

13th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon because there was no such acquiescence on the part of defendant or its inhabitants as would estop it or them from disputing the validity of the bonds issued without authority of law by the organization of 1883.

14th. The court erred in that part of its last or additional conclusion of fact wherein it finds that there is embraced in the city of Lampasas as it has existed since 1890 substantially all the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people, such finding being immaterial for the following reasons, viz:

I. The organization of 1883 and all its acts were void, and as it could create no debts binding on itself, the defendant, a pre-existing incorporation, would not, by adding the greater part of its territory, become liable for debts it had not itself created.

II. The debt attempted to be created, being greater than was authorized by defendant's assessed values at the time of the issuance of the bonds or at any time since, could not become binding by reason of any subsequent acts of defendant.

III. The bonds not having been issued or registered as required by the ordinances under which they were issued or the statutes of the State, and not having been sold at "not less than par" as required by said ordinances, but having been traded at less than their par value for the purpose of evading the provisions of the ordinances, they would be invalid, even if defendant's territory and inhabitants had been identical with that of the organization of 1883 and defendant has been the successor thereof.

67 15th. The court erred in its said last or additional conclusion in that it is not warranted by, but is in conflict with, the other conclusions of fact on which it was based, which other con-

clusions show that there has been at no time embraced within defendant's territory substantially all the persons and property that was embraced within the limits of the organization of 1883.

16th. The court erred in its conclusions of law and the judgment rendered thereon because the facts agreed on at the trial and which were adopted as conclusions by the court show that plaintiff, by his acts, conduct, and acquiescence from 1889 to the time of the institution of this suit, was estopped from claiming that the bonds sued on were valid obligations of defendant.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for Defendant.

Endorsed: No. 2296. James M. Bell *vs.* City of Lampasas. Assignment of errors. Filed this 14 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

Petition for Writ of Error.

Filed July 14, 1899.

United States of America to the honorable the justices of the Supreme Court of the United States:

Now comes the City of Lampasas, a municipal corporation in the county of Lampasas, State of Texas, by its attorneys of record, Fiset & Miller and Matthews and Browning, and respectfully represents to your honors that in cause No. 2296, wherein said City of Lampasas was defendant and James M. Bell was plaintiff (Messrs. West & Cochran, of Austin, Travis county, Texas, being attorneys of record for plaintiff), pending in the United States circuit court, fifth circuit and western district of Texas, at Austin, wherein was involved
68 the construction and application of the Constitution of the United States, and wherein a law of the State of Texas was claimed to be in contravention of the Constitution of the United States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under such Constitution, and the decision was also in favor of the validity of said law of said State, and judgment was rendered at the July term of said court, in 1899, against defendant and in favor of said James M. Bell for the sum of two thousand five hundred and fifty-two and $\frac{70}{100}$ ($2,552.70) dollars on or about July 12, 1899, together with interest from said date and costs, and that in the record, proceedings, and rendition of the judgment in said cause manifest error hath intervened, to the great damage of it, the said City of Lampasas.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

FISET & MILLER AND
MATTHEWS & BROWNING,
Attorneys for City of Lampasas.

Granted the 14th day of July, A. D. 1899.

T. S. MAXEY, *Judge.*

Endorsed: 2296. James M. Bell *vs.* City of Lampasas. Petition for writ of error. Filed this 14 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

Writ of Error Bond.

Approved and filed July 14th, 1899.

In the Circuit Court of the United States, Western District of Texas, at Austin, Texas, Fifth Circuit, July Term, 1899.

JAMES M. BELL
vs.
THE CITY OF LAMPASAS. } No. 2296.

69 Whereas in the above styled and numbered cause, pending in the United States circuit court, fifth circuit, and western district of Texas, at Austin, Texas, and at a regular term of said court, to wit, on the 12th day of July, 1899, the said James M. Bell, plaintiff in said cause, recovered judgment against The City of Lampasas, the defendant therein, for the sum of twenty-five hundred and fifty-two and $\frac{70}{100}$ dollars, with interest thereon from said date, at the rate of six per cent. per annum, and all costs of suit, and from which said judgment the said City of Lampasas has sued out a writ of error to the Supreme Court of the United States:

Now, therefore, we, The City of Lampasas, as principal, and J. W. Townsen, C. D. Stokes, W. T. Campbell, and J. F. White, as sureties, acknowledge ourselves bound to pay to said James M. Bell the sum of two hundred and fifty dollars ($250.00), conditioned that the said City of Lampasas shall prosecute its writ of error to effect and shall answer all costs if it fails to make its plea good.

Witness our hands and seals this 12th day of July, 1899.

THE CITY OF LAMPASAS,
By MATTHEWS & BROWNING, *Its Attorneys.*
J. W. TOWNSEN. [SEAL.]
C. D. STOKES. [SEAL.]
W. T. CAMPBELL. [SEAL.]
J. T. WHITE. [SEAL.]

Approved July 14, 1899.
T. S. MAXEY, *Judge.*

Certificate of Solvency of Bond.

THE STATE OF TEXAS, }
County of Lampasas. }

I, J. E. Morgan, clerk of the county court in and for said county, do hereby certify that J. W. Townsen, C. D. Stokes, W. T. Campbell, and J. F. White, whose names appear signed to the annexed bond, are, in my opinion, good and ample security for the
70 amount therein specified; that they each have property in said county subject to execution of a larger amount, and that

if said bond was offered to me for approval the same would be accepted and approved.

To certify which I hereunto set my hand and impress of my official seal, at office, in the city of Lampasas, on the 12th day of July, 1899.

J. E. MORGAN,
Clerk County Court, Lampasas County,
By D. J. MORRIS, *Deputy.*

[SEAL.]

[Revenue stamp.]

Endorsed: No. 2296. James M. Bell *vs.* The City of Lampasas. Error bond. Filed this 14 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, holding sessions at Austin, in said district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between James M. Bell, who is plaintiff, and The City of Lampasas, as defendant, No. 2296 on the docket of said circuit court of the United States, western district of Texas, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said City of Lampasas, which is plaintiff in error herein, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof, in the said Supreme Court of the United States to be then and there held, and, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas, at Austin.

Allowed this the 14th day of July, A. D. 1899.
T. S. MAXEY,
United States Judge.

72 [Endorsed:] No. 2296. James M. Bell *vs.* City of Lampasas. Writ of error. Filed July 14th, 1899. D. H. Hart, clerk.

73 THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to James M. Bell or his attorneys of record, Messrs. West & Cochran, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, sitting at Austin, in the cause wherein The City of Lampasas is plaintiff in error and you, the said James M. Bell, are defendant in error, to show cause, if any there be, why the judgment rendered against the said City of Lampasas, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Signed this the 14th day of July, A. D. 1899.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

T. S. MAXEY,
United States Judge.

Attest: D. H. HART, *Clerk.*

We hereby waive being served with a copy of the foregoing citation and accept service thereof this 14th day of July, 1899.

WEST & COCHRAN,
Attorneys of Record for Defendant in Error, James M. Bell.

74 [Endorsed:] No. 2296. James M. Bell *vs.* City of Lampasas. Citation. Marshal's return. Filed this 14 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

75 *Certificate of Clerk.*

Dated July 19, 1899.

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States in and for the western district of Texas, hereby certify that the foregoing, on seventy-two pages, besides this, is a true and correct copy of all papers filed and proceedings had in cause No. 2296, styled James M. Bell *vs.* The City of Lampasas, as the same appear on file

and of record in this office, and, further, that the original writ of error and citation in error in said cause are embodied in said transcript.

In testimony whereof witness my official signature and seal, at office, in Austin, Texas, this 19th day of July, 1899.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk U. S. Circuit Court, W. D. T.,
By J. W. HANCOCK, *Deputy.*

[Endorsed:] Transcript in the case of The City of Lampasas, plaintiff in error, *vs.* James M. Bell, defendant in error.

Endorsed on cover: File No., 17,485. W. Texas C. C. U. S. Term No., 115. The City of Lampasas, plaintiff in error, *vs.* James M. Bell. Filed August 10th, 1899.

14564

No. 115.

Brief of Miller for P. E.

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY,
Clerk.

Filed Nov. 1, 1900.

No. 115.

In the Supreme Court of the United States.

October Term, A. D. 1900.

The City of Lampasas, Plaintiff in Error,

vs.

James M. Bell, Defendant in Error.

Error to the United States Circuit Court for the Western District of Texas, at Austin.

Brief for Plaintiff in Error.

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AUSTIN STEAM PRINTING COMPANY

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I.

This suit was brought in the United States Circuit Court for the western district of Texas, on June 21st, 1897, by James M. Bell, a citizen of the State of Pennsylvania, against the City of Lampasas, a city alleged to have been incorporated under the laws of the State of Texas.

The plaintiff by his amended petition filed on 11th day of July, 1899, seeks to recover, together with interest thereon, the amount of certain unpaid coupons for interest on "Lampasas City Waterworks Bonds."

The essential allegations of plaintiff's petition were that

the defendant was "a municipal corporation duly chartered under the laws of the State of Texas," and as such was authorized by its charter to construct waterworks and issue bonds for that purpose; that by virtue of these powers and of the laws of the state, it did on January 6th, 1885, by ordinance duly passed, provide for the issuance of forty bonds of one thousand dollars each, with interest coupons attached, and did further provide that the bonds should, among other things, at the time of their issuance be registered by the city treasurer, and did further provide that said bonds should be sold and the proceeds thereof devoted exclusively to the construction of a suitable system of waterworks for fire protection, etc.; that in pursuance of said ordinance and by virtue of its charter powers and for the purpose of providing funds to construct a system of waterworks, defendant did, on March 27th, 1885, duly execute, in accordance with the requirements of said ordinance, its said forty interest bearing coupon bonds (setting out copy of one of said bonds) which is signed as follows: "W. J. Standefer, Mayor; S. S. Potts, Secretary; ....., Comptroller, State of Texas S. S. Potts, Secretary City of Lampasas; W. S. Morris, Treasurer City of Lampasas;" that the said bonds were registered by W. S. Morris as its treasurer, by his signature thereon as above appearing, and said bonds were duly registered by the comptroller of the state, and a certificate to that effect signed by him was endorsed thereon; that said bonds were by defendant placed upon the market and sold in due course of trade, and defendant received for the same forty thousand dollars in money, for the purpose of providing a system of waterworks, and thereby became liable to the bearer of each of said bonds and coupons in the several sums therein specified; that plaintiffs, in due course of trade and for valuable consideration, purchased and became the owner of the coupons in suit, and although they were past due, the defendant refused to pay same in the sum aforesaid. (Tr. 1.)

It was not alleged in plaintiff's petition whether defendant

was incorporated under the general laws of the state, or by special act of the legislature; nor were the provisions of its charter set forth, either in substance or effect; nor did it appear that the city council was authorized by the city's charter to pass the ordinance providing for the issuance of bonds nor any other ordinance for such purpose. It is recited on the face of the copy of the bond set out in the plaintiff's petition that a copy of the ordinance by virtue of which the bond was issued, was printed on the reverse side of the bond, but the ordinance, neither in terms nor substance is set forth in the petition. It further does not appear from the face of the bond, copy of which is set out, that the bonds were registered by the city treasurer, or by the comptroller of the state, or that the latter endorsed on the bonds his certificate of registration, as required by the statutes of the state.

The defendant in its answer demurred generally to the petition, and specially excepted to it on account of the defects next above mentioned, and for the further reason that it appears from said petition that defendant was incorporated under the general laws of the State of Texas, which general laws, in so far as they relate to the formation of municipal corporations, and all charters of and attempts to create municipal corporations thereunder were null and void, the legislature in the enactment of such general laws having attempted to delegate to the voters the right to form municipal corporations and fix the boundaries thereof. (Tr. 5.) The court overruled the demurrer and exceptions. (Tr. 38.) The defendant answered by general denial and then specially alleged:

(1.) That defendant was incorporated by special act of the legislature, April 18th, 1873, and from then until now has continued to be a municipal corporation; that neither the bonds nor coupons in suit were issued or signed by its authority, nor by the authority of any of its officers; that the organization assuming defendant's name, when the bonds were issued in 1885, and whose officers signed the bonds, was never incorporated, that said bonds were not

the act of defendant, and therefore it was not liable thereon. This plea was under oath.

(2.) That the special act incorporating defendant in 1873 defined its territorial boundaries, within which was an area of about 553 acres, established all its offices and provided for the election of its officers at an election held by the mayor and three aldermen on the first Monday in January every second year after the first election under the charter; that in pursuance of this act the city government of defendant was organized in 1873, and maintained its organization until sometime in the year 1876, but that from 1876 until 1890 no officers were elected within said city limits, and no city government was actively maintained.

That in 1893 the county judge of Lampasas county, ignoring the said incorporation of the City of Lampasas, upon the application of certain voters, some residing within said city limits and others without; entered an order for an election to be held to determine whether or not a town should be incorporated under the name of "The City of Lampasas," with the boundaries mentioned in the order, which boundaries were fixed by the signers of said application and included an area of about 1500 acres; and afterwards, on March 14th, entered an order on the minutes of the commissioners court—after reciting in said minutes that a majority of the votes cast at said election were in favor of such corporation—that the inhabitants of said area were incorporated as the City of Lampasas; that this area included most of the territory of the City of Lampasas incorporated by said special act; and twice as much territory in addition thereto—twice as many lots and blocks actually occupied as town property—and was occupied by nearly twice as many inhabitants as were within the bounds described in 1873. That said county judge then made an order for the election of officers of said territory and organization, and on the 17th day of April, 1883, the inhabitants of said entire extended territory elected the various officers provided for by the general laws of Texas for towns, and thereafter other

elections were held within said territory from time to time for municipal officers, in accordance with the general laws of the State, but not in accordance with the provisions of said special act of 1873, and until the fall of the year 1889; that the bonds and coupons in suit were issued by the organization claiming the name "City of Lampasas" and operating within said larger area, according to the provisions of the general laws of the state, and were signed by the officers of that organization, but that said officers in issuing and signing the bonds did not attempt or pretend to act for this defendant or to bind it, but attempted and held themselves out as having power to bind the organization operating under the general laws, and which claimed to have been created by the proceedings undertaken in 1883.

That at the fall term 1889 of the district court of Lampasas county, the State of Texas, upon the relation of one W. B. Abney, filed a quo warranto proceeding against T. J. Largen, who claimed to be mayor of the organization of 1883, and such other persons assuming to be the officers of said corporation, to oust them from their said offices, and prevent them from further usurping the office which they claim to hold by virtue of said pretended organization; that thereupon proceedings were had in said court which resulted in November, 1889, in a judgment ousting the defendants from their offices, because the incorporation of the City of Lampasas, as attempted in 1883, was illegal; and upon appeal said judgment was by the Supreme Court of the state affirmed; that thereupon the pretended organization of 1883 was abandoned and no further proceedings or acts have since been had or done thereunder by virtue thereof.

That in 1890, an election was held within the boundaries prescribed in said special act, and officers were elected to the various offices; and they and their successors in office have been ever since and now are administering its affairs, and by reason of these facts, the defendant city should not be held liable on the bonds and coupone issued by the organization of 1883.

(3) That said bonds were issued by virtue of an ordinance passed by the persons claiming to constitute a city council, composed of five members, as provided by the general laws of the state, while the power under the special act of 1873, to pass ordinances was conferred upon a mayor and a board of aldermen composed of eight members; and if the persons who acted as the city council in passing the ordinance to issue the bonds, assumed to act as the city council of the defendant, which is denied, the ordinance was not passed by a body empowered under defendant's charter to pass same, and did not, therefore, authorize the issuance of the bonds.

(4.) That the city treasurer did not register said bonds nor endorse thereon a certificate of registration as required by the ordinance under which the bonds were issued, as appeared from the ordinance printed on the back of the bonds. The provisions of the ordinance were set out in full in defendant's answer.

(5.) That the ordinance printed on the back of the bonds provided that the bonds should be sold at not less than par and in such manner as was then or might thereafter be provided for by ordinance, resolution or otherwise, and that the proceeds of such bonds should be devoted exclusively to the construction of a suitable system of waterworks; but that the city council did not, after the passage of the ordinance make any provision for the sale of the bonds, and that they were not in fact sold for any sum, but were delivered in payment for a system of waterworks worth not exceeding twenty thousand dollars, and they were so delivered to evade the provisions of said ordinance.

(6.) That if said bonds were registered by the comptroller of the state, he did not endorse on any of them his certificate of registration authenticated by his official seal as was required by the general laws of the state, to make them valid.

(7.) That the defendant has never come into the possession of the waterworks constructed in exchange for the

bonds of said organization of 1883, or of any other property acquired by that organization, but when said organization was abandoned, said property was taken possession of by persons who claimed to own all of said bonds, and has ever since been in their vendee's possession.

(8.) That the levy and collection of a tax of twenty-five cents on the one hundred dollars valuation of taxable property within defendant's boundaries at any time during the year 1884 or 1885, or since would not produce enough revenue to pay the interest on said issue of $40,000.00 of bonds and create a sinking fund of at least two per cent. and that therefore said bonds were issued without authority of law and contrary to the provisions of the Constitution and laws of the State of Texas.

(9.) That chapter I and II, title 17, of the Revised Statutes of Texas and acts amendatory thereof, under and by virtue of which said proceedings of 1883 were had, and by virtue of which the corporation which issued the bonds was attempted to be formed, are in violation of section 1 of the fourteenth amendment to the Constitution of the United States, in that they provide for the formation of municipal corporations, with power to levy taxes on property therein, with boundaries not fixed by the legislature or by any body or tribunal before whom the residents of the territory proposed to be incorporated, could be heard; that said pretended municipal organization of 1883 was formed without defendant's voters having an opportunity to be heard on question of the boundaries of the proposed corporation, and by reason of the fact that a majority of the voters within the boundaries described in said order of said county judge resided outside of defendant's boundaries, it was possible for them to organize said pretended corporation of 1883, including all the inhabitants of defendants, without their consent, and said ordinances by virtue of which said bonds were issued providing for the levy and collection of taxes to pay said bonds, if said bonds are held to be binding on defendant, then the necessary result thereof will be that defendant's tax-

payers, who own within defendant's boundaries more than one half of the property situated within the boundaries of said organization of 1883, will be required to pay more than one half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law. (Tr. 7 to 18.)

The plaintiff in a supplemental petition replied:

(1.) That the officers who issued the bonds, in suit were the de facto officers of defendant;

(2.) That the acts of the people within the boundaries prescribed by the organization of 1883, by voting to incorporate under the general laws, made such City of Lampasas a valid corporation within said extended territory, notwithstanding this incorporation included within said boundaries another municipal corporation previously chartered by the special act, and that all the lands and property within said extended limits have since been added to and are now within the limits of defendant city as at present prescribed, and that plaintiff is entitled to judgment establishing his debt as against the corporation with its full limits existing in 1885, when the debt was created.

(3.) That after the reorganization in 1890 of defendant's city government under the special charter of 1873, the defendant's city council, as elected by the inhabitants of the territory as defined in said special charter, passed a resolution to abandon the special charter and to adopt in lieu thereof the general laws of the state relating to cities, and thereafter on December 26th, 1890, duly and legally added the principal part and substantially all the inhabited portion of the territory outside the boundaries as fixed originally in 1873, and within the boundaries as fixed by the proceedings of 1883, and that by such addition fully ninety per cent of the population and taxable values of said organization that operated from 1883 to 1890 were brought within the City of Lampasas, as was also the system of waterworks, bridges, graded streets and other property of said organization.

(4.) That all acts of said organization of 1883, including its incorporation were validated by the acts of the legislature of the state, passed after the year 1883. (Tr. 18 to 22.)

Defendant by a supplemental answer demurred generally and specially to this supplemental petition and each allegation thereof, which demurrers the court overruled, and further denied all the essential allegations contained therein. (Tr. 22 to 24.)

A jury by written agreement duly filed was waived, and the cause submitted to the court. (Tr. 24, 37.)

The court filed its conclusions of fact, the material portions of which, are as follows:

1. That the City of Lampasas, in Lampasas county, Texas, were by special act of the legislature, approved April 18th, 1873, granted a charter as a municipal corporation, under the name of the "Corporation of the City of Lampasas," with boundaries containing an area of 553 acres, covering the original town plat and a considerable area not laid out in regular blocks. In this special charter it was provided that the qualified voters should elect a mayor and board of aldermen, consisting of eight members to hold office for the term of two years, and until their successor should be elected and qualified, and it was further provided that the mayor and five aldermen should constitute a quorum for the transaction of business. It was also provided that the first election should be held within thirty days, and on the first Monday in January of each alternate year thereafter by the mayor and three aldermen. The act made no provision for dissolving the corporation, and no period of time was fixed for the expiration of this charter.

2. Under this special charter the said mayor and aldermen were granted power by ordinance among other things, to construct waterworks, open, grade and keep in repair the streets, build bridges, open sewers, to impose and collect

taxes, not exceeding one per cent per annum, and to issue bonds for public improvements. The mayor and aldermen were authorized to appoint a city marshall who should also be ex-officio assessor and collector of city taxes, and also to appoint a secretary and city attorney, but the office of treasurer, nor any other officer than those named were provided for.

3. That officers were elected and the said municipal government was exercised by them under the said special charter from 1873 until 1876, when a mayor and a board of aldermen were elected who favored abolishing the said municipal government, and they, by formal resolutions, decided to resign and did so, and abandoned their said offices, and thereafter no steps was taken or action of any kind had under this special charter until March, 1890, after the decision of the Supreme Court of Texas in the case of Largen vs. The State of Texas, reported in 76th Texas Reports, page 323, hereinafter more fully referred to.

4. That the said City of Lampasas was in 1873, and has since continued to be the county seat of Lampasas county, and had a population in 1876 of about 800. That until the year 1882, the said town was without railroad facilities, when upon the advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4500 people with street railroads and other improvements; about 1884, the population began to decline and continued to decline till about 1890.

5. That at all times the business portion of the town has been chiefly confined to the courthouse square and streets leading out from it, and has been within the bounds of the said special charter, but during and since 1882, business houses were built near the railroad depot outside of said bounds, and outside of the present limits, but inside of the boundaries of 1883, and business has been since transacted therein.

7. That in February, 1883, a petition was presented to the county judge of the said Lampasas county by more than

fifty qualified voters living in and around the limits of said town, asking that an election be ordered to determine whether the persons living within the limits in said petition set out should incorporate as a city of more than one thousand inhabitants, under the provisions of the general laws of Texas as contained in title 17 of the Revised Statutes.

Upon this petion the said county judge made his order and an election was held resulting in a majority vote in favor of said incorporation, some of those voting living inside and some outside of the limits prescribed by said charter, and upon the return thereof the said county judge, by proper order, declared the result of said election and declared the said city duly incorporated with the limits in said petition set out and which contained an area of 1495 acres, embracing practically all the lands included within the said special charter, and extending nearly one-half mile west, north and east thereof, to include the railroad depot.

8. That in pursuance of this incorporation, a municipal government was organized with all the officers prescribed in the general charter contained in said title 17, some of the aldermen and other officers residing outside of the limits prescribed by said special act, and exercised all the powers and functions of a city of over one thousand inhabitants, organized under the general laws of the State of Texas, levying and collecting taxes, and prescribing and enforcing police regulations without any one contesting or disputing the validity of its lawful rights to act as such until November 4th, 1889, when upon the relation of a citizen and taxpayer the district attorney, himself also a resident taxpayer, filed an information, in the nature of a quo warranto, against T. J. Largen, who was mayor, and all other persons assuming to act as city officers under this incorporation by vote of the people, alleging that the said incorporation by vote of the people in 1883 was invalid because of the fact that the said special charter granted in 1873 had never been repealed, and that the action of the officers in resigning in 1876 was without effect, and praying that the said Largen

and his associates be ousted from office, and the said incorporation of 1883 be declared invalid.

9. That said suit was instituted by the said district attorney without any direction by the attorney general or other executive officer of the state, and without making any of the creditors of said corporation parties, and upon trial resulted in a judgment ousting the said Largen and associates, which judgment on appeal was affirmed by the Supreme Court of Texas on the 31st day of January, 1890, and its opinion may be found in Vol. 76 at page 323, of the official published reports of said court.

10. That after the decision of the Supreme Court affirming said judgment of ouster, the said Largen and associates ceased to act, and upon an order for the election of mayor and aldermen under the special charter of 1873, made by the county judge of Lampasas county, an election was held by persons living within the limits of said charter on the 18th day of March, 1890, and on March 22nd, 1890, by unanimous vote of the city council it was resolved to accept the provisions of "Title XVII of the Revised Statutes of the State of Texas, in lieu of the charter granted by the legislature," and a copy of this resolution was duly certified and recorded as required by law, and said city at once assumed to act under the general charter provided in said title 17, and are now acting thereunder.

11. That on December 26th, 1890, by a vote of the majority of the resident citizens of the added territory hereinafter mentioned, there was added to the limits of the city as set out in the special charter of 1873, the greater part of the land west of the same, which was included within the limits of 1883, and one tier of blocks additional, since which time the said city government has assumed jurisdiction over said added territory, but has not assumed any jurisdiction over that part lying north and east of said original limits, and which was included within the limits of 1883.

12. The area of the territory added in December, 1890,

was 428 acres, which embraced the greater part of the residence property of the city, outside of the original charter limits of 1873.

13. That the said territory lying north and east of said original limits and which was within the limits of the charter of 1883, as adopted by the vote of the people, has situated therein seventy-seven residence houses, occupied by persons, ninety per cent of whom follow some kind of business within the town as defined by the charter limits of 1873. (A map is made part of this finding and will be found on page 27 of record. This map shows the original boundaries of defendant, its present boundaries, and the boundaries of the organization of 1883.)

14. All the books and papers of the city government of the City of Lampasas under the charter of 1873 and 1883 were lost and could not be found, except the assessment rolls for the year 1889, from which it appears that the assessed values of all lands within the city limits of 1889 was $664,429.00 and that the personal property was about $400,000, and that the said assessment was divided as follows as to the lands, no division being shown as personal property, viz: within the limits of 1873, $452,444.00; within the part added in December, 1890, $157,915.00, and within the parts north and east $68,970.00.

15. The said rolls show the names of 438 voters divided as follows, viz: Residing within old limits of 1873, were 175; residing on part added in December, 1890, 167; residing on part north and east, 96.

16. In January, 1885, the city council of said City of Lampasas elected under the provisions of the general charter contained in title 17 aforesaid, and assuming to act thereunder and not under the provisions of the charter of 1873, in good faith and response to a general demand of the business men of the city for fire protection and to furnish water for the city, then having a population of about 4500, determined to build a system of waterworks for the city and to pay for the same with the proceeds of sale of bonds of the

city and to this end, after full and open discussion, did pass ordinances to the following effect, viz:

[In this (16th) finding the ordinance is set forth in full and the material portions thereof are as follows:]

Sections 1, 2 and 3 of said ordinance authorize the mayor to have the bonds engraved and fix the amount ($40,000) to be issued, the rate of interest and date of maturity.

Sections 4 and 5 of said ordinance are as follows:

Section 4. Said bonds shall at the time of their issuance, be dated and signed by the mayor, countersigned by the city secretary, and registered by the city treasurer.

Section 5. The city secretary and the city treasurer shall each keep a record of the number, date of issuance and amount of said bonds, and the number, amount and date of maturity of the coupons thereto attached, and shall endorse the countersigning and registration thereof on each of said bonds.

Section 7 provides for the levy and collection of ad valorem taxes to pay the principal and interest of the bonds.

Section 10 of said ordinance is as follows:

Section 10. The bonds herein provided for shall be sold at not less than par, and in such manner as is or may be hereafter provided by ordinance, resolution or otherwise, and the proceeds of said bonds shall be devoted exclusively to the construction of a suitable system of waterworks for fire protection, family supply, and other public and private purposes, and for the purpose of such fire department supplies as may be deemed necessary by the council; said system of waterworks to be operated in such manner as may be hereafter provided by ordinance, resolution or otherwise.

Filed January 6th, 1885. S. S. POTTS, Secretary.
Passed January 6th, 1885. S. S. POTTS, Secretary.

I approve the above ordinance, January 6th, 1885.

J. W. STANDEFER, Mayor of City of Lampasas.
Attest: S. S. POTTS, Secretary.

18. The city council that passed said ordinance above recited, was composed of the mayor and five aldermen, all of whom were elected by a general vote of the entire corporation within the limits of the charter under the incorporation of 1883. Two of the said aldermen and the city secretary resided in the territory outside of the charter limits of 1873, and one of said two aldermen resided in the territory northeast of said limits and outside of the present city limits.

19. After the adoption of the ordinance as aforesaid, the said city council advertised for bids for the construction of a system of waterworks, and personally inspected similar waterworks in neighboring towns, and also tried to negotiate a sale of said bonds for cash. Failing to effect a sale of bonds by the time set for receiving the bids, the letting of the contract was postponed; at this time several bidders were ready to submit plans and bids, but as all contemplated being paid in cash no bids were made or received. There was present at this time prepared to submit a bid a responsible party, willing to build a system of waterworks for $25,000 in cash, but it is not known what kind of a system of waterworks this party intended building, as to the size of the mains, pumps, stand pipes or other details, or whether he proposed to build as good a system as was subsequently built, the fact being that this bidder demanded cash payment and was unwilling to take bonds in payment.

20. At a later date the said city council awarded the contract to a bidder who was willing to build a system according to his plans at the price of forty thousand dollars, to be paid in bonds of the said city, and this contractor proceeded to build the said system, and the same was fully tested by the city council before acceptance, and upon such test and approval the said works were accepted and paid for by the delivery by the city council of the bonds as called for in the contract. The city officers paid for the waterworks in bonds because they had been unable to sell the bonds for the money. The bonds were not considered good for their face value: if

they had been so considered, the waterworks could have been constructed for less.

21. The said system of waterworks as built, was worth at cash value based upon the cost of construction, the sum of $26,279.00 without allowing anything by way of profits to the contractor.

In the 22nd finding one of the bonds issued in payment for the waterworks is set forth in full, they being for $1000 each with interest coupons attached, dated March 27th, 1885, styled, "Lampasas City Waterworks Bonds," and signed by W. J. Standefer, Mayor, and attested by S. S. Potts, Secretary, with his seal. In the upper left hand corner in transverse form and separated from the bond by vignette line was the following: ".....,
Comptroller, State of Texas; S. S. Potts, Secretary City of Lampasas; W. S. Morris, Treasurer City of Lampasas." On the back of the bond was the following endorsement: "Registered March 28th, 1885, W. J. Swain, Comptroller," but no seal was affixed to such signature or endorsement. On the back of the bond was printed a copy of the said ordinance. The bonds did not bear any evidence of registration by the city treasurer or comptroller of the state other than what appears above, but the bonds were in fact registered in the office of the comptroller as found by the court in the 23rd finding. In the 24th finding the court found that recovery on some of the coupons sued on was barred by the statute of limitation, and that on the others there was due $2100 principal and $452.70 interest.

25. At the time of the affirmance of the judgment in Largen vs. State, 76 Texas, 323, one H. E. Hedeman, was in charge of the waterworks so acquired for said bonds, he having taken charge of said waterworks as superintendent before the dissolution of said organization of 1883; he held possession of said waterworks under a claim of one hundred and fifty dollars back salary due from the dissolved organization and for some other monies due him for a house placed on the waterworks grounds; asserting such claim he re-

mained in charge of such waterworks for over one year from the dissolution of said corporation of 1883. He delivered possession of said waterworks to Coler & Bro., bankers and brokers of New York City, through their agent, W. L. Vining, for the reason that Coler & Bro., paid him the debt due him and for his interest in said house, said Vining at the time exhibiting to him one of said bonds of said series, and stating that said Coler & Bro., owned it and all other bonds of said series, and said Coler & Bro., and their assigns, have from that time controlled and claimed to own said waterworks and still control and claim to own said system of waterworks. The bond exhibited to said Hedeman by Vining was not one of the number from which any of the coupons in suit were taken; nor did said Coler & Bro., own or represent any of the owners of the bonds from which the coupons in suit were taken. Said Hedeman did not pretend to act for the City of Lampasas in making said settlement, and only assumed to act in the protection of his own claim, and plaintiff refused to act with Coler and has had no connection with him in any way.

26. Since the reorganization of the city government of 1890 under the special charter of '73 and the general charter adopted immediately thereafter, the City of Lampasas has exercised no control over said waterworks, but has paid monthly, first to said Hedeman, and then to Coler & Bro., for the use of water supplied by said waterworks system and since said reorganization in 1890, said City of Lampasas has not taken possession of any other property within its limits that was acquired or constructed between 1883 and 1890, except one bridge built prior to 1890, but which was not paid for, but which, on account of such non payment, was taken possession of by the builders and sold by them to the county of Lampasas and the city as organized in 1890.

27. The pumping station of the waterworks as originally constructed was situated within the corporate limits as defined in the charter of 1883, but was removed by the

city in 1887 to a point without the corporate limits of 1883, and has remained at said place ever since. The stand pipe was located at a point near the west line of the charter limits, and the distributing of water mains leading from such stand pipe, were distributed through the part of the city west of the original charter limits of 1873, thence through the business part of the city within said original limits and extending eastward and northward to the railroad depot, and said stand pipe and all of said distributing mains and fire hydrants are within the limits of the city now existing (composed of the original charter limits and the territory added in 1890), except that for a distance of about 900 yards one of said mains extended northward to said depot with one fire hydrant thereon.

28. There has at all times been a well defined business center in the City of Lampasas, which is within the limits of the charter of 1873 and between 1885 and 1890, a number of business houses and residences were established in the neighborhood of the railroad depot, all of which were within the limits of the charter of 1883 but are not within the limits over which the present city government assumes jurisdiction. Within this territory there are seventy-seven inhabited dwellings and two vacant dwellings. Of the persons occupying these dwelling houses ninety per cent did business within the present limits of the city.

29. The majority at the election held in 1883 to determine whether the City of Lampasas should be incorporated under the general laws was 85, and at that time the population within the boundaries sought to be incorporated was four or five thousand.

31. That between 1885 and 1889, there was great depreciation in property values and decrease in population in the original limits of the City of Lampasas, in the part thereof added to the city in 1890, and in that part of the city organized in 1883 that is not included in either the original limits of 1873, or in that added in 1890, but such decrease and depreciation was greater in that part not in either said

original limits or said territory organized by the proceedings of 1883, the least decrease and depreciation being in the limits prescribed by the act of 1873.

All the foregoing findings were based upon agreements made on the trial, to which the court made the following additional finding:

From the facts agreed upon by the parties as above set out, the court concludes that within the City of Lampasas as now organized and has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them as a valid city government from its adoption until the quo warranto proceedings against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same. (Tr. 24 to 36.)

Upon such findings the court based the following conclusions of law:

CONCLUSIONS OF LAW.

1st. The coupons in suit constitute a valid and existing liability against the present City of Lampasas except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation and the remaining 60 coupons sued upon not being barred by the statute are valid and the defendant should be required to pay for the same. Shapleigh vs. San Angelo, 167 U. S., 646; City of Lampasas vs. Talcott, decided by Circuit Court of Appeals, 5th Circuit, on the.....day of.....18..... (Tr. 36 and 37.) Judgment was rendered for plaintiff as prayed for. (Tr. 38.) The plain-

tiff in error duly excepted in open court to the judgment and conclusions of the court (Tr. 38) and now asks that the judgment be revised on account of errors assigned, those deemed material being as follows:

1st. The court erred in overruling the defendant's general demurrer and its 8th special exception to plaintiff's amended petition. This was erroneous, because the only legitimate inference to be drawn from said petition is that it seeks to recover from the defendant as a municipal corporation, attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, no special statute being pleaded, which general laws relative to the formation of municipal corporations and the levy and collection of taxes thereby, are in conflict with section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations are not fixed by the legislature, nor does the law make any provisions by which said boundaries can be fixed by any tribunal before which the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the corporation.

3rd. The court erred in overruling defendant's third exception to plaintiff's first supplemental petition wherein the plaintiff pleaded the validating acts of the legislature, passed after the year 1890, as curing irregularities in the charter of 1883. Said ruling was erroneous for the following reasons, viz:

I. Said validating acts were not intended to, did not purport to and did not validate such proceedings as those pleaded by plaintiff and defendant as having been done and had in 1883, whereby a city was attempted to be incorporated so as to embrace within its boundaries with other territory, an existing city.

II. Said validating acts attempt to validate acts done or attempted to be done under said articles of the Revised Statutes, relating to municipal corporations, which were in violation of section 1 of the 14th amendment to the Constitu-

tion of the United States for the reasons as stated in the first assignment of error herein.

III. Said validating acts were in effect special acts and therefore void.

4th. The court erred in its last conclusion of facts, its conclusions of law, and the judgment rendered thereon because: The organization formed in 1883 under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable, but wholly void, for the reason that such organization was attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, which general laws of the State of Texas then in force and embraced in title 17 of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby were in violation of section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation.

6th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon, because the defendant was incorporated as a city by a special act of the legislature in 1873, which fixed its boundaries, and it has continued ever since as a municipality without any change in its charter until 1890; and the attempted organization of a municipal corporation in 1883 under the general laws of the state (even conceding said law to be constitutional) including nearly three times as much territory as was included within the boundaries described by said special act, not by the inhabitants of defendant, but by a majority of the inhabitants of such larger territory, a majority of such inhabitants residing outside of defendant's limits was without

authority of law, null and void and did not destroy or effect the corporate existence of defendant.

7th. The court erred in its last conclusion of fact, its conclusions of law and the judgment thereon, because if the organization of 1883 was a de facto corporation, so that the bonds issued by it would be obligations against that corporation, or the inhabitants thereof, the conclusions of fact show that defendant was not, when said bonds were issued, or when the organization of 1883 was dissolved or abandoned in 1889, and is not now, the same corporation as that attempted to be formed in 1883 under the defendant's name, did not and does not embrace the same inhabitants, territory or property substantially, is not the successor thereof, and has not at any time received or acquired any property that may have belonged to said organization of 1883, so that, if said bonds are in any respect valid obligations, as against the municipality called the City of Lampasas, organized in 1883, they are not obligations on which defendant is liable.

8. The court erred in its conclusions of law, and the judgment rendered thereon, because there cannot be a de facto corporation including within its boundaries the greater part of the inhabitants and territory of an existing legal municipal corporation, a large amount of other territory, and a large number of other inhabitants, with power to bind by its contracts or acts such existing legal municipality.

9. The court erred in its conclusions of law and its judgment rendered thereon, because the persons who, as officers of said organization of 1883, issued said bonds and passed the ordinance authorizing the issuance of same, were not the officers of defendant, were not the same officers as were by defendants charter authorized to pass ordinances and issue bonds, were not when they passed said ordinances and issued said bonds, assuming or pretending to act as the officers of this defendant, and were therefore not de facto officers of defendant.

10. The court erred in its conclusions of law and the judg-

ment rendered thereon, because when the illegal organization of 1883 was abandoned in 1889, having within its boundaries 438 taxpaying voters and an area of 1495 acres, its liabilities did not become the liabilities of defendant, which then had only 175 taxpaying voters and an area of 553 acres, and not then being liable, the defendant did not become bound for said liabilities in December, 1890, when it attached 428 acres out of the 942 acres of the territory of the organization of 1883, not included within defendant's boundaries.

11. The court erred in its last conclusion of fact, its conclusion of law, and the judgment rendered thereon, because at the time of the issuance of said bonds, the only legal existing city was the defendant with the boundaries fixed by its charter of 1873, and at that time the property within such boundaries did not exceed in value the sum of one million dollars, and the levy and collection of a tax of 25 cents on each one hundred dollars in value of the property within said boundaries would not then, or at any time since, produce enough revenue to pay the interest on the bonds mentioned in plaintiff's petition and create a sinking fund of at least two per cent, and such issuance of bonds was therefore illegal as being in violation of section 9 of article 9, and section 7 of article 11, of the Constitution of the State of Texas, and no subsequent change in defendant's boundaries or increase in its territory or taxable property, would render such bonds valid.

12. The court erred in its conclusions of law and the judgment rendered thereon, because the city treasurer did not endorse on said bonds his registration thereof as required by the ordinances by virtue of which they were issued, and which ordinances were printed on the back of the bonds, nor did the comptroller of the State of Texas endorse thereon his certificate of registration thereof, authenticated with his official seal, as required by the statutes of the State of Texas. These certificates were necessary in order to give the bonds validity, or if not necessary in order to give them

validity, the want of such certificates of registration destroyed the negotiability of the bonds and charged the purchasers thereof with notice of the facts, found by the court, that the bonds were not sold at par and the proceeds used in the construction of a system of waterworks, as required by said ordinances, but upon the contrary the whole issue of $40,000 of bonds was traded for a system of waterworks, worth much less than that sum, and that this was done to evade the provisions of said ordinances, and because said bonds were issued before one of the ordinances authorizing their issuance and printed on the back thereof, had taken effect.

13. The court erred in its last conclusion of fact, its conclusion of law, and the judgment rendered thereon, because there was no such acquiescence on the part of defendant or its inhabitants as would estop it or them from disputing the validity of the bonds issued without authority of law by the organization of 1883.

14. The court erred in that part of its last or additional conclusion of fact, wherein it finds that there is embraced in the City of Lampasas as it has existed since 1890, substantially all the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883, by vote of the people, such finding being immaterial for the following reasons, viz:

I. The organization of 1883 and all its acts were void, and as it could create no debts binding on itself, the defendant, a pre-existing incorporation, would not, by adding the greater part of its territory, become liable for debts it had not itself created.

II. The debt attempted to be created being greater than was authorized by defendant's assessed values at the time of the issuance of the bonds or at any time since, could not become binding by reason of any subsequent acts of defendant.

III. The bonds not having been issued or registered as required by the ordinances under which they were issued or the statute of the state, and not having been sold at "not

less than par" as required by said ordinances, but having been traded at less than their par value for the purpose of evading the provisions of the ordinances, they would be invalid, even if defendant's territory and inhabitants had been identical with that of the organization of 1883, and defendant had been the successor thereof.

15. The court erred in its said last or additional conclusion in that it is not warranted by, but is in conflict with, the other conclusions of fact, on which it was based, which other conclusions show that there has been at no time embraced within defendant's territory, substantially all the persons and property that was embraced within the limits of the organization of 1883. (Tr. 41 to 46.)

FIRST PROPOSITION.

The general laws of the State of Texas relating to the formation of municipal corporations under which the organization formed in 1883, was attempted to be incorporated and which issued the bonds sued on in this cause, are in violation of section 1 of the 14th amendment to the Constitution of the United States, in that they provide for the formation of municipal corporations with power to levy taxes on persons and property therein, with boundaries not fixed by the legislature, or by any body or tribunal before whom the residents of the territory proposed to be incorporated could be heard, as to whether their property was such as should be included within the corporation and made subject to taxation therein.

So much of the statutes of Texas relating to the formation of municipal corporations as are deemed material are set forth in Appendix A hereto attached. We have been able to find no similar statutes in any state except Michigan, and municipal corporations formed under those statutes were in the case of People vs. Bennett, 29 Mich., 451, held to be invalid because, among other reasons, the citizens had no opportunity of being heard before any tribunal, on the

question as to what territory should be included within the boundaries. By reference to articles 340 and 506 to 514 of the Texas Statutes in force in 1883, (see Appendix A) it will be seen that fifty petitioners fix the boundaries of the proposed corporations and present their petition to the county judge. No notice of the presentment of the petition is given nor is any provision made for a hearing at which any citizen may present any objection he may have to his property being included within the limits of the corporation. Upon receiving the petition, the county judge must order an election for the purpose of submitting the question of incorporation to the vote of the people, and upon receiving the returns of the election if the majority of the votes cast are in favor of incorporation, he must make an entry upon the records of the commissioners court that the inhabitants of the city are incorporated, etc, and the city shall then be invested with all the rights incident to such corporations. Chapter V, of title 17, of the Revised Statutes in force in 1883, which is too long to be inserted in full here, authorizes the levy of various ad valorem and occupation taxes by the city councils of incorporated cities. Unquestionably the legislature would have power, in the absence of constitutional restrictions, to create municipal corporations with such boundaries as it deemed proper, but when this power is delegated it must be delegated to some body or tribunal before whom citizens of the territory proposed to be incorporated can have an opportunity of being heard as to whether their property is of that nature, or so situated, that it should be included in a municipal incorporation and made subject to taxation therein. It is not sufficient that the citizen is given a right to a hearing, after the corporation is formed, before some tribunal as to the amount of assessments on his property or as to the amount of municipal burden to be borne by him; he is first entitled to be heard before some tribunal as to whether he or his property shall be included within the bounds of the municipality and be required to bear any of its burdens; and if he is deprived of

a hearing on either of these questions he has been deprived of his property without due process of law, and any statute which deprives a citizen of these rights is in violation of that provision of the Constitution of the United States referred to in above proposition. In 2d Dillon on Municipal Corporations, 4th Ed., Sec. 183, it is said that "where municipalities are organized under general statutes, no expression of the legislative will as to the exact boundaries of any particular place proposing to be incorporated can be made. The vital question of boundaries must then be determined in some other mode * * * but how and by whom is the extent of the territory to be included within the corporate limits (which necessarily settles what property and what persons will become subject to municipal rule) to be determined? Unless specially restrained by the state constitution the legislature may delegate this power to appropriate local bodies or boards of officers."

The Texas statutes in force in 1883 did not delegate this power to any body, board or tribunal, but they permitted any fifty citizens to fix the boundaries, and left to the county judge only the duty of ordering an election on the question of corporation. There has been some question as to whether the power of the legislature to fix the boundaries of municipalities could be delegated to the court, but in the case of Forsythe vs. City of Hammond, 166 U. S., 506; this court held that the determination of the territorial boundaries of a municipal corporation was purely a legislative function, though full jurisdiction of such matters might be given to the courts. In the opinion in that case as well as in the opinion in the circuit court in the same case (68 Fed. Rep., 774) it seems to be conceded that when the constitution of a state denies to the legislature the power of creating municipal bodies or enlarging or contracting their boundaries by special act, and requires such changes to be provided for by general laws, the legislature must confer upon some tribunal the power to determine whether the conditions exist prescribed by law for the creation, enlargements or contrac-

tion of a municipal body. Very few, if any, municipal corporations would be formed were it not for the fact that such corporations are permitted to levy taxes on persons and property therein, to accomplish purposes and to carry on public improvements necessary for the health, comfort and convenience of the residents of the corporation, so that it may be said that one of the principle reasons for the state creating or authorizing the formation of such corporations is to confer upon the inhabitants thereof the power of levying and collecting taxes for the accomplishment of such purposes.

It is, therefore, just as important that every citizen of a proposed corporation should have a hearing as to whether his property should be included within its bounds as it is that those whose lands are to be subjected to taxation to pay for public improvements, such as drainage and irrigation ditches, should have a hearing before some tribunal as to whether their lands are benefited by such public improvements, where the legislature has not itself determined the lands to be benefited thereby.

In the case of Spencer vs. Merchant, 125 U. S., 345; this court held, in effect, that the legislature might itself determine the lands to be benefited by a public improvement to be paid for by taxation or such determination might by the legislature be left to another tribunal, but if left to another tribunal the persons whose lands are to be subjected to taxation to pay for such improvements are entitled to a hearing before such tribunal upon the question whether their lands are benefited or not, and that it was not sufficient if they merely have a hearing upon the amount to be assessed against their lands. In discussing a similar question this court, in Parsons vs. District of Columbia, 170 U. S., 45, said: "Where the legislature has submitted these questions for enquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the enquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice, or an

opportunity to be heard." In the case of Fallbrook Irrigation district vs. Bradley, 164 U. S., 112, there was involved the validity of the statutes of California, authorizing the formation of irrigation ditches and this court said: "The formation of one of these irrigation districts amounts to the creation of a public corporation. * * * There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which required notice to or hearing of the parties included therein, before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it. In the act under consideration, however, the establishment of its boundaries, and the purpose for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in, an assessment upon all the lands included within the boundaries of the district. The legislature thus, in substance, provides for the creation, not alone of a public corporation but of a taxing district, whose boundaries are fixed, not by the legislature, but, after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose.

"It has been held in this court that the legislature has power to fix such a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature, where it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the 'apportionment of the tax,' i. e., the amount of tax which he is to pay. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what land described in the petition will be

benefited, and that decision of the question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decision of this court in Spencer vs. Merchant, 125 U. S. 345, and Walston vs. Nevin, 127 U. S., 578."

As stated above, the statutes of Michigan relating to the formation of municipal corporations were substantially the same as those of the State of Texas in force in 1883 (see Appendix A.) In People vs. Bennett, 29 Mich., 451, where corporations formed thereunder were held to be invalid the court said "a compulsory corporation can only come from direct legislative action or the action of such persons or bodies as by the law of the land be vested with sufficient delegated authority to bind the community. There are few, if any, acts of state bearing upon individuals more important than those which determine their liberty to be included in particular municipalities; and the cases are very rare in which they have not been allowed an opportunity of being heard in every step of the proceedings. It is manifest that one of the first and most vital questions involved is that of boundaries. It may be too plain for dispute that certain lands are so occupied as to require corporate organization for their convenient government. There may be, for example, in any township a small region densely inhabited with more people than all the rest. Any question on which they unite could be carried by their votes at a township election. But it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests, in which the rest of the town had no concern. That question should be decided on its own merits by an authority so

constituted as to be presumably impartial. While there are some exceptional statutes which leave a large coercive control to the authorities vested with power of local legislation, there are few, it any, which allow an election to be ordered, or any definite step to be taken until all persons interested have had a chance to be heard." And after quoting from many decisions referring to the case under consideration the court further said "any number of resident legal voters, not less than thirty, may file a petition deseribing the location and boundaries and the number of inhabitants, and the proposed name, and asking that the question of incorporation be submitted to the resident voters. This petition is to be filed in the circuit court. Upon receiving the petition the judge is required without further enquiry or ceremony, to have entered an order in the journal, appointing a time and place in said territory for an election. The return of votes is made to the circuit judge. If the proceedings are formal he is then compelled to enter another order declaring the incorporation. In examining these proceedings the fact which is most prominent throughout, is that there is not in the whole course a single act of any importancr which is performed by any public ageney whatever, whethee legislative, executive or judicial. The propriety of the shape or boundaries of the proposed village is often the principle thing deemed necessary to be settled by the legislature when it submits a charter to the proper vote, most charters being substantially alike in their scope.

"Under this law a bare majority, collected anywhere may annex, in any direction any two square miles of land in spite of courts, supervisors and all other public authorities. The thirty signers of the petition determine absolutely the contents of the village. * * * * No one has a right of hearing, and no hearing could avail if had." Referring to this case (People vs. Bennett) Judge Dillon, in note to Sec. 183 of 1st volume of his work on Municipal Ccorporations, says that there "this subject is, with his usual ability, learnedly examined by Cambell, J., from whose opinion the doctrines of the text

have mainly been deduced." All that is said in that opinion is applicable to the organization of 1883 under defendant's name and to the statutes under which the organization was formed. These statutes provide for no hearing. The petitioners fix the boundaries and a majority of voters determine whether there shall be a corporation. As the majority of the voters of the organization lived outside of defendant's boundaries (see 15th and 31st findings of the court, Tr. 28 and 35) it was possible that the vote for the proposed corporation be carried although every voter within the territory of defendant (then an existing corporation) voted against it. Under the decisions of this court above cited, and that of the supreme court of Michigan, these statutes, we submit, authorize the taking of property without due process of law, and bonds issued by any corporation attempted to be formed thereunder are void.

SECOND PROPOSITION.

The defendant city was incorporated by a special act of the legislature in 1873, and has since continuously existed as a distinct independent municipal corporation, and the attempted incorporation under the general law in 1883 of another "City of Lampasas," not by the inhabitants of the defendant city but by a majority of the inhabitants within an area that included its territory, and in addition twice as much more territory, resulted not in a mere irregularly organized corporation, but in an organization created without warrant of law and void *ab initio*.

The facts as stated in this proposition were found by the trial court as will be seen from the preliminary statement above. Under those facts the organization attempted to be formed in 1883 was by the supreme court of Texas in the case of Largen vs. State, hereinafter referred to, held to have been created without warrant of law. The same court in other cases hereinafter cited, held similar organizations to have been created without warrant of law and void, but the

circuit court in this case, and the circuit court of appeals for the fifth circuit in the case of the City of Lampasas vs. Talcott, seem to have considered these cases to be in conflict with the opinion of this court in the case of Shapleigh vs. San Angelo, 167 U. S., 646. In the latter case the inhabitants of incorporated territory became incorporated under the general laws of Texas and issued bonds for street improvements. Its organization having been dissolved by proceedings instituted for that purpose by reason of its limits including a large amount of uninhabited pasture land, it was re-incorporated by the same inhabitants but excluding the pasture lands; the two corporations included the same inhabitants, all of the same territory that should properly be embraced within municipal boundaries, and all of the improvements for which the bonds were issued. For this reason this court held that the last was the successor of the first corporation formed and was liable on the bonds, the first corporation not being void by reason of it including pasture lands. In the opinion in that case this court said: "The doctrine successfully invoked in the court below by the defendant that where a municipal incorporation was wholly void *ab initio* as being incorporated without warrant of law it could create no debts and incur no liabilities, does not in our opinion apply to the case of an irregularly organized corporation which had obtained by compliance with a general law authorizing the formation of municipal corporations, an organization valid against everybody except the state, acting by direct proceedings. Such an organization is merely voidable." We submit that the organization of 1883 assuming defendant's name was without authority of law and void. It was not a mere irregular corporation formed by inhabitants of unincorporated territory endeavoring to comply with the laws relating to the creation of municipal corporations, but was an attempt by the inhabitants of its territory to create a municipal corporation including within its boundaries a much smaller municipality than had been incorporated by the legislature. Two distinct, independent

co-ordinate municipal corporations cannot exist at the same time in the same territory and over the same inhabitants. The objection, therefore, to a corporation—that it includes uninhabited pasture land may point out a mere irregularity, while the objection that it includes an already existing corporation evidently goes to its very foundation. In the one case a person dealing with a corporation relies upon its apparent regularity in the other case he is charged with notice of the legal existence of the first corporation and is conclusively presumed to know that the officers of the second corporation can exercise no power over the inhabitants of the first one, or create any debts to bind them. He accepts the obligations of such second corporation at his peril.

It will be seen that the statutes of Texas relating to municipal corporations (see Appendix A) provide a mode by which the inhabitants of unincorporated territory can be incorporated as a municipal corporation, and this was the mode adopted in creating the corporation of San Angelo, and the irregularity in that case consisted only in including uninhabited pasture lands. This was also the mode adopted in attempting to create the corporation of the City of Lampasas in 1883 including the existing City of Lampasas which had been created in 1873. It was a mode unauthorized by law in such cases. The statutes did provide a mode by which existing cities might accept the provisions of the general laws of the state in lieu of their charters, but this mode was not adopted or attempted to be adopted, and the defendant city continued to exist and was existing under its original charter during the entire time that the organization of 1883, assuming its name was in operation. In State vs. Denison, 71 Texas, 65, the Supreme Court of Texas said: "There is no doubt that the legislature might have provided that the inhabitants of an incorporated town might, by a majority vote, accept incorporation under the general law as was done by the act of January 27, 1858, and thereby repeal the former charter; and it would seem that this would be more in harmony

with the spirit of our institutions than is the mode provided by article 340, Revised Statutes. This was, however, a matter for the consideration of the legislature, and a town or city already incorporated, and desiring to re-incorporate under the general law must, to accomplish that, follow the mode now prescribed. If that course had been pursued, the corporation would, however, be restricted to the boundaries prescribed in the proceedings had under the act of January 27, 1858, and to attach other territory it would be necessary that the inhabitants thereof should comply with articles 343 and 503, Revised Statutes, and that the town council, by ordinance, receive the additional territory. Nothing of this kind was done, but so far as appears from the record, persons living within and without the corporate limits attempted, in their own way, to incorporate a town to embrace land not within the existing incorporation. * * * We are of the opinion that the proceedings alleged to have been had in 1887, did not create a corporation, or in any manner dissolve the corporation created in 1859."

Articles 340, 343 and 503, above cited, are set forth in Appendix A hereto, and from article 343 it will be seen that if there had been an attempt to adopt the revised statutes the corporation would have been confined to the area of 553 acres included within the boundaries prescribed by the act of 1873 instead of including an area of 1495 acres over which municipal government was sought to be established by the proceedings had in 1883. The fact that this territory of 1495 acres was included in the atttempted incorporation of 1883 shows that the intention of the people participating in the proceedings of 1883 was not to adopt the Revised Statutes in lieu of the existing charter and limit the boundaries to those of the existing corporation, but was to create a new corporation by a mode and under circumstances not authorized by law.

In Largen vs. State, 76 Texas, 323, the identical case at bar was before the Supreme Court, and it was held "that the municipal corporation known as the City of Lam-

pasas, incorporated under the act of April 18th, 1873, still exists." And after quoting and referring to the statutes above cited, the court further said "through all the legislation bearing upon the question, there is nothing to intimate the intention to permit existing corporations to incorporate under the general law, and thus dissolve the existing corporation in any other manner than that prescribed by the act of March 15, 1875." (Rev. Stats., Art. 340.) The court proceeded to hold that the organization of 1883 was without warrant of law.

In Buford vs. State, 72 Texas, 182, the facts were similar to those in the Largen case, and the Supreme Court held that the incorporation under the general law of territory including an existing corporation was without authority of law. The Largen, Denison and Buford cases were cited with approval in Harkness vs. State, 76 Texas, 566. In that case the facts were that the town of Colorado was, in February, 1882, incorporated as a town of more than 200 and less than 1000 inhabitants under the provisions of chapter 11, title 17, of the Revised Statutes of Texas (see Appendix A.) In 1883, ignoring that corporation, the citizens of that town and the surrounding territory attempted to incorporate as a city by petition and vote of the citizens and after such election a municipal government provided for cities of over one thousand inhabitants was organized. The supreme court held that there was nothing in the statutes relating to cities and towns which countenanced the holding that an existing corporation could be destroyed by such a procedure, and that the original corporate existence given through the proceedings of February, 1882, continued and still exists. It is true that in each of the above cases direct proceedings were instituted by an officer in behalf of the state, but the opinion in each case was that the attempt to create under the general laws a corporation including an existing corporation was without authority of law.

Though such proceedings were instituted none were necessary, but such a proceeding was necessary in the San Angelo

case, as in that case there was a mere irregularity in the proceedings by which that corporation was formed. In Lum vs. City of Bowie, 18 S. W. Rep., 142, a collateral attack upon the corporate existence of the City of Bowie was upheld. The facts were these:

In 1883, the town of Bowie was incorporated under the general law as a town of more than 200 and less than 1000 inhabitants. In 1887 the citizens of the town and other territory attempted to incorporate as a town of 1000 inhabitants or over, and after a petition had been presented, an election held and the result declared, a municipal government as provided for towns of over 1000 inhabitants was organized, and taxes levied on the complainant's land, which was within the boundaries of the attempted corporation of 1884, but without the boundaries of the corporation of 1883. Complainant brought suit to enjoin the collection of the taxes. The only question in the case was whether the proceedings and the organization of 1884 were absolutely void. The court held the original incorporation of the town of Bowie in 1883 remained as it was with its territorial limits as originally defined, and that the proceeding in 1884 by which a corporation was attempted to be formed including an existing corporation were not mere irregularities, but were absolutely void.

So far as we have been able to find, the decisions outside of Texas are in harmony with the Texas cases above cited. In the case of Town of Decorah vs. Bullis, 25 Iowa, 12, there was a collateral attack upon the corporate existence of the town of Decorah, which was incorporated in 1857 under the Iowa Code of 1851 and acted until 1860, when, without any dissolution of that corporation, the people of the town elected officers pursuant to the act of 1858, and thereafter operated under that act, under the assumption that by this means the town was legally organized under the act of 1858. The original charter vested the legislative authority in a president and board of six trustees and provided for a secretary and required election of the officers to be held annually on

the last Tuesday in June. Acting under the act of 1858 the people elected on the first Monday in March, a mayor, recorder and five trustees, and the town council consisting of these officers passed a certain ordinance. In a suit by the town based upon the ordinance, the defendant denied the corporate power of the town under its organic law to pass such an ordinance. The court reached the conclusion that the town of Decorah did not become in law organized under the law of 1858 by the abandonment of its charter and electing officers and operating under that law, but that on the contrary, the organic act of the town continued to be the code of 1851, and the charter adopted thereunder, and that the ordinance passed by the town council was unauthorized and void.

The case of Welch vs. St. Genevieve, 1 Dillon, C. C., Rep., 130, heard before Judges Dillon, Treat and Krekel, directly applies to the question under consideration. In that case plaintiff sued on the bonds issued by the city of St. Genevieve, that was incorporated by the special act of 1849, and judgment by default was entered in his favor. Execution was issued and returned *nulla bona*, and plaintiff moved the court for a mandamus to compel the mayor and aldermen of the city who were last elected to levy a tax sufficient to pay the judgment. These persons made return as individuals that for a long time they had not been the officers of the city, and that its offices were vacant; that on these grounds the county court, acting under the general laws of the state, in 1867, declared the "Town of St. Genevieve" incorporated by the name of "The Inhabitants of the Town of St. Genevieve."

Judge Dillon in rendering the opinion of the court says: "I deny that a corporation created by the legislature, for the purpose of a local municipal government can, without a provision to that effect, be dissolved by the mere failure to elect officers. The corporation is created by the charter". * * * "The charter or constituent act of the corporation of St. Genevieve not being limited in duration and not

having been repealed by the legislature is still in force, and the artificial body which it created still exists. * * * The corporation offices became vacant and not having been filled are still vacant, and we have the anomaly presented of a public corporation without any officers de jure or even de facto to execute its powers or fulfill its duties. It is now suggested that the old corporation if not dissolved in the manner before considered was nevertheless dissolved or superseded by the organization in 1867 of the town corporation by the county court under the general laws of the state. If it was thus superseded the enquiry would arise whether the town corporation was anything more than the authorized legal successor of the old corporation and bound to discharge its obligations. But on examining the above mentioned statutes under which the supposed new incorporation was attempted, and on which it rests for all the legal virtue it possesses, we find that it only authorizes in the mode therein prescribed, the incorporation of towns and cities not already incorporated. It does not empower a town or city incorporated by special charter, and which cannot, therefore, destroy its corporate life at its own pleasure, to abandon its charter without the consent of the legislature which gave it, thereby leaving the locality without municipal government or rule.

"Legislative sanction is, in this country, indispensibly necessary to the existence of every corporation, and as this new town organization is without legislative authority, it is wholly without validity, and its officers have no right in law to exercise powers under the general incorporation act; much less have they the right to exercise the functions of officers under the special charter.

"The city corporation being that which was established by the legislature under the charter, and that corporation remaining in existence, although it is without officers, it is clear that no validity can attach to an unauthorized organization under the general law. * * *

"The corporation under the special charter and its amend-

ments is the legal and only corporate body; the new organization is a bald usurpation of the franchises of the state, and its acts, unless ratified by the legislature, are simply void."

In Morton vs. Carlin (Neb.), 70 N. W., 966, the facts were similar to the Texas case of Lum vs. Bowie, above cited, and the Supreme Court of Nebraska held that the proceedings by which a corporation was attempted to be formed including an existing corporation were absolutely void, and that the corporation so attempted to be formed had neither a de facto nor a de jure existence. To the same effect was the opinion of the Supreme Court of Michigan in Cain vs. Brown, 70 N. W. Rep., 338. But even if the decision of the Texas courts above cited should be found to conflict with decisions of other courts, or they should be thought to be wrong in principle, still the subject to which they relate being the formation and existence of subordinate tribunals of the state and the construction of state statutes, they will be followed by this court. In Norton vs. Shelby County, 118 U. S., 425, this court said: "The decision of the Supreme Court of Tennessee as to the constitutional existence of the board of commissioners of Shelby county is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justice of the peace of the county, and that their action in holding the county court was utterly void.

"This court should neither gainsay nor deny the authoritative character of that determination."

In Claiborne County vs. Brooks, 111 U. S., 400, 410, it was said:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts

on the subject will be regarded as authoritative by the courts of the United States."

In D'Wolf vs. Roband et al, 1 Pet., 501, the court said:

"What might be our own view of the question, unaffected by any local decisions, it is unnecessary to suggest; because the decisions in New York upon the construction of its own statute, and the extent of the rules deduced from it, furnish in the present case a clear guide for this court."

In the United States vs. Morrison, 4 Pet., 137, the Supreme Court of the United States followed the construction placed by the Court of Appeals of Virginia on a statute of that state, although the latter court had never construed the statute until after the case under consideration had been appealed to the Supreme Court of the United States. And in Davis vs. Briggs, 97 U. S., 628, the Supreme Court placed a different construction on a statute of North Carolina from what it before placed upon similar statutes of other states in order to follow the construction placed upon the statute by the Supreme Court of North Carolina.

In the case of Warburton vs. White, decided February 26th, 1900, this court said that "where state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state courts of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even though the decisions of the state court from which the rule of property arises may have been for the first time announced subsequent to the period when a particular contract was entered into." The question of following the decisions of the state courts was considered in the case of Burgess vs. Seligman, 107 U. S., 20, where this court said, "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that

by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal Courts * * * * as authoritative declarations of what the law is. But * * * * when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." This court should follow the decisions of the Texas courts above cited, not only because they construe the statutes of the state, but also because it is evident that inextricable confusion will result from any other course. From those cases it appears that the Supreme Court of Texas has decided a number of attempted corporations, such as the attempted corporation of the City of Lampasas in 1883, to be void. These cities have all doubtless resumed the performance of their duties under their original charters, and, acting thereunder, have entered into new contracts and incurred new obligations, as has been done by the City of Lampasas (see 34th finding on pages 35 and 36 of record.) If the old obligations, such as those sued on in this case, are by the court held to be valid, then the taxing power of the city will have been exhausted, so that many of the new obligations issued in accordance with the statutes as construed by the state courts will be worthless, as will be those of the City of Lampasas, for the reason that a levy of a tax of 25 cents on each one hundred dollars in value of the property in the city

will not raise enough money to pay the interest on the bonds of the series in controversy in this suit and create a sinking fund of two per cent, the said tax of 25 cents being the maximum rate allowed by the Constitution of Texas, and an issue of bonds being illegal where such taxation will not produce enough money to pay the interest thereon and create a sinking fund of two per cent. Gould vs. City of Paris, 68 Texas, 517 (see 23rd, 31st and 34th Findings on pp. 33, 35 and 36 of record.) The result of a refusal on the part of this court to follow the state decisions will be that in suits in the Federal Courts all such debts as those sued for in this cause will be held to be valid obligations of such cities, and in the state courts they will be held to be void. In suits upon such obligations as those entered into by the City of Lampasas since it resumed operations under its original charter, if the suits are in the state courts such obligations will be held to be valid, but if the suits are in the Federal Courts the obligation will be held invalid because the taxing power of the cities was exhausted before they were incurred. The reason for the general rule of the Federal Court to follow the decisions of the state courts is to obviate just such uncertainty and confusion as this, and we submit that this court should adopt that construction of the statutes of Texas which has been given them by its own courts and hold that the attempted incorporation in 1883 was wholly void as being created without warrant of law and that it could create no debts that would be binding on defendant.

THIRD PROPOSITION.

The officers by whom the bonds were issued were not de-facto officers of defendant:

In support of its opinion in this case the trial court cited the case of Shapleigh vs. San Angelo and the case of the City of Lampasas vs. Talcott, decided by the Circuit Court of Appeals, 5th circuit on the .....day of ...1899. In the former case no question of de facto officers was involved. The Tal-

cott case was a companion case to the one under consideration and involved the validity of the same bonds. In that case the Circuit Court of Appeals held that the officers by whom the bonds were issued were de facto officers although they were acting for and as officers of the illegal organization of 1883 and under the general laws of the state. We cannot conceive of a person being a de facto officer when he does not assume or claim to be such officer. If one does not claim to be an incumbent of an office he cannot be a de facto officer. The officers who issued the bonds did not pretend to be the officers of defendant. The bonds were issued by a city council composed of a mayor and five aldermen, holding office under the organization of 1883 and claiming to act thereunder and not under the charter of 1873, some of said aldermen not residing within the boundaries of 1873 (16th and 18th findings of the court). This city council certainly cannot be held to be a de facto tribunal or legislative body of defendant, whose affairs under its charter were to be managed by a board of aldermen composed of a mayor and eight aldermen (see first finding, Tr. 24). The treasurer who participated in the execution of the bonds could not be a de facto officer of defendant, whose charter did not provide for such an officer, nor did it provide for any such body as a city council to administer its affairs. (Morton vs. Shelby County, 118 U. S., 425.) In the case of Town of Decorah vs. Bullis above cited, the court said: "By the charter the legislative authority of the town was vested in a president and six trustees. These officers were by the charter required to be elected annually on the last Tuesday in June. This body, not another body, must exercise the legislative authority of the corporation. To no other body does the organic law of the place give the power to pass ordinances. The body which passed the ordinance in question was in law a different body from that provided in the charter. It was elected under a different law. * * * The election was held at a different time from that required by the charter. The body elected was a different body because differently named and different-

ly constituted. It consisted of a mayor, recorder and five trustees, and not of a president and six trustees. The latter body was not in law the legislative body of the corporation. If the corporate body which passed the ordinance had assumed to act under and by virtue of the charter, in other words, had assumed and claimed to be the trustees of the town under its organic act, their acts as such officers being in such case officers de facto, would undoubtedly be valid. But the body which passed the ordinance made no such claim and assumed no such powers. They claimed to act under the statute of 1858, not as the legislative body authorized by the charter * * * but as a legislative body of a new or re-organized corporation whose existence in point of law was mythical. * * * The only doubt the court has had respecting this case is whether it was not one in which to apply the doctrine that the acts of de facto officers, as distinguished from the acts of mere usurpers, are valid.

"But in addition to the reasons above given there seems to be an insuperable objection to this view in the fact that before one can claim to be a de facto officer of the law, there must be a law creating the office. The office itself must be de jure; the officer may then be de facto.

"To the organic law of the town there was no such office known as the office of mayor; no such office as that of recorder; nor no such office as the five trustees specified in section 31 of the act of 1858. How then can persons assuming to be mayor, recorder and trustees, elected as such, styling themselves such, and acting and professing to act as such by virtue of a law which has no application to the town, claim to be de facto officers of the corporation when the corporation has in law no power in any case or under any circumstances to elect such officers."

In the case of Welch vs. St. Genevieve above referred to the court said:

"If the gentlemen who are claiming under the new organization to be the officers of the town had been elected under the new charter, though irregularly, and were exercising and

claiming to exercise the powers given by the charter which is still the organic act of the municipality they would be in the true sense of the term, officers de facto, and their acts as respects the public would be valid, and this court might notwithstanding the irregularities in their election, issue its mandamus to them to levy and collect the tax necessary to satisfy the plaintiff's judgment. But they were not elected under the charter, nor do they claim or assume to be the officers of the city."

The pretended corporation of 1883 included nearly three times as much inhabited territory and over twice as many inhabitants as the territory defined in defendant's charter; its governing body and officers were different, were elected at different times, and did not claim at any time to represent defendant or to act under its charter. We therefore urge that our contention that the officers who issued the bonds were not de facto officers of defendant is right in principle and supported by the authorities. (See Harness vs. The State, 76 Texas, 571.)

FOURTH PROPOSITION.

The defendant is not the successor of the municipality attempted to be created in 1883, is not composed of substantially the same inhabitants and has not succeeded to any of its property rights. It is, therefore, not liable on the bonds issued by it.

From the findings of the trial court (Rec. 37) it is evident that its judgment is founded principally on that part of the opinion of this court in the case of Shapleigh vs. San Angelo, where it is said: "that the disincorporation by legal proceedings of the City of San Angelo did not avoid legally subsisting contracts, and that upon the re-incorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligations of the old devolved upon the new."

Conceding that the corporation under the name of the

City of Lampasas attempted to be formed in 1883, was not an absolute nullity, as above contended, but was merely an irregularly formed corporation, still defendant is not liable for obligations contracted by it under the doctrine as enunciated in the San Angelo case, because:

1st. It is not its successor.

2nd. It did not acquire any of its property or improvements for which the bonds in controversy or other liabilities were issued or contracted.

First. The defendant was created a corporation in 1873 with an area of 553 acres (see Rec. 24.) It was an existing corporation when the corporation of the same name was attempted to be created in 1883, was an existing corporation when the bonds were issued in 1885 and has continued to exist until now. How, then, can it be deemed the successor of the organization of 1883? When the corporation of 1883 ceased to perform any functions in 1890 the defendant again began to exercise the privileges conferred by its charter, the exercise of which had ceased for a number of years. It is urged, however, that after defendant began the exercise of those privileges a considerable portion of the territory of the corporation of 1883 was added to and became a part of the territory of defendant so that thereafterwards the defendant's limits embraced substantially all the persons and property embraced within the boundaries of the corporation of 1883. Does that fact create a liability which did not exist before? It will scarcely be contended that if the bonds were not issued by the officers or de facto officers of defendant; they constituted liabilities of defendant at the time of their issuance. If not then liable, when did defendant become liable?

Certainly, not when the organization of 1883 was abandoned, because the defendant then did only what the law required it to do, that is, resume the performance of its duties under its charter. If the holders of the bonds then had any right, it was a right to proceed against the persons and property within the territory of 1495 acres embraced within

the limits of the corporation of 1883. Now these being the debtors, is defendant liable because it added a part of that territory to it? Certainly not. It might be liable in some equitable proceeding, but is not liable on the contract sued on as the successor of the corporation attempted to be formed in 1883. An examination, however, of the facts as found by the court, will, we think, show that defendant's territory does not, even after the addition of part of the territory of the corporation of 1883, include substantially the same inhabitants, territory and property as was included within the boundaries of the latter corporation, and will show that a railroad depot, business houses and many residences that were in the limits of 1883 are not in defendant's limits. These findings show that the territorial area of defendant was 553 acres and that of the corporation of 1883 was 1495 acres, of which amount 428 acres was added to defendant in 1890, and after this addition 22 per cent of the inhabitants and 34 per cent of the territory embraced in the corporation of 1883 was and still is outside of the limits of defendant. (See 1st, 5th, 7th, 11th, 12th, 13th, 15th and 28th findings. Tr. 24, 25, 26, 27, 28, 34 and 35.)

Does the Shapleigh case go to the extent of holding that 78 per ceut of the inhabitants, living upon 981 acres out of 1495 acres, and owning 90 per cent in value of the larger area, are substantially the same inhabitants and includes the same resources for revenue? The very gist of the Shapleigh decision is that the same or "substantially" the same people who created the debt, should pay it. The word "substantially" is not defined or limited in its meaning in that opinion. The case was decided upon demurrer to plaintiff's petition, wherein was the following allegation, "that the territory of the new corporation was all embraced in the boundary lines of the old organization, and although smaller in area than the territory of that organization, included all the lands thereof actually occupied and inhabited as a town." That case is based upon Broughton vs. Pensacola, 93 U. S., 266, and Mobile vs. Watson, 116 U. S., 289. In the Brough-

ton case, the court says: "The citizens residing within the limits of the city proceeded to establish a municipal government with corporate authority under the act of 1869," and the question was whether this new corporation was liable for bonds issued by the old. In that case the incorporators and territory were exactly the same both before and after the reorganization. In the latter case, Watson sued the Port of Mobile to recover on bonds issued by the City of Mobile. The agreement of facts by counsel in that case was, "that the taxable property within the latter * * * was $16,255,093.00, and that all of said taxable property was embraced within the limits of the Port of Mobile, except about $900,000, and that about fourteen-fifteenths of the resident inhabitants of the City of Mobile were resident inhabitants of the Port of Mobile." From these three cases the words, "substantially the same inhabitants" can be gathered to cover no more than fourteen-fifteenths of the inhabitants. Is that authority for holding that 78 per cent of the inhabitants are "substantially" all the inhabitants? If so, where will the line be drawn? It would be grossly unjust and contrary to the contract to relieve a great part of those who contracted the debt from all its burdens. It is unjust to make 78 per cent bear the entire debt and wholly relieve 22 per cent of the inhabitants who equally participated in its creation.

Second. Nor is the defendant liable upon the ground that it has received the property of the corporation attempted to be formed in 1883. The 25th and 26th findings of the court (Rec. 33 and 34) show that when the organization of 1883 was abandoned in 1889, the water works plant for which the bonds in question were issued remained in the hands of an employe of the organization for about a year, when it passed into the hands of persons claiming to own all the bonds. Such persons have ever since controlled and claimed to own the water works: the defendants has never controlled them, but has ever since 1890 paid monthly to those in possession thereof, for the water used therefrom. None of

the other property of the organization of 1883 has ever passed into the hands of the defendant. (Rec. p. 34.) Having received no benefits from the illegal organization of 1883 the defendant is not even equitably bound for any debt it may have attempted to create. In this respect also this case is different from the Shapleigh case, in which the defendant received the full benefit of the improvements paid for with the proceeds of the sale of the bonds issued by the irregularly formed corporation which it succeeded.

FIFTH PROPOSITION.

The ordinance printed on the back of the bonds, the coupons of which are in suit, required the city treasurer to endorse his registration on the bonds, and the statutes of the State of Texas required that the certificate of registration by the comptroller should be also registered on the bonds.

The bonds were issued without the performance of these conditions and were not therefore, legal obligations either of the defendant city or the organization formed in defendant's name in 1883.

There was no certificate of registration of the city treasurer endorsed on the bonds. (Tr. 33.) In the findings of fact of the court appear the following: "On the back of said bonds was the following endorsement: 'Registered March 18, 1885, Wm. J. Swain, Comptroller,' but no seal was affixed to such signature or endorsement." (Tr. 33.)

Sections 4 and 5 of the ordinance requiring the registration of the city treasurer to be endorsed on each of the bonds are quoted in the preliminary statement above. (Tr. 28 and 29.)

The Revised Statutes, 1879, of the state, requiring the endorsement by the comptroller of his certificate of registration, reads as follows:

"Art. 423. It shall be the duty of the mayor whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the state,

whose duty it shall be to register such bond or bonds in a book kept for that purpose, and to endorse on each bond so registered his certificate of registration and to give at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date."

"Art. 2738. He (the comptroller) shall procure at the expense of the state a seal with the words 'Comptroller's office, State of Texas' engraved around the margin, and a star with five points in the center thereof, which shall be used sa the seal of the comptroller's office in the authentication of all his official acts, except warrants drawn on the treasury of the state."

The doctrine is well established by this court, that if the directions prescribed either in the ordinance under which municipal bonds are issued, or by the statutes of the state, are not complied with, the payment of the bonds cannot be enforced in a suit at law.

Anthony vs. Jasper County, 101 U. S., 693, was a case involving the validity of municipal bonds which had not been registered by the auditor of the State of Missouri in accordance with a statute of that state, and the court held that the endorsement of registration thereon by the auditor was a part of the execution of the bonds and that no legal liability was created until such endorsement was made. The court further said "that other circumstances may exist which will give the holder an equitable right to recover from the municipality the money which the paper he has got represents, but he has no bond which he can enforce as such, or which can be put on the market as commercial paper." That decision was not based upon the fact that the statute required that the bonds should be registered before they should have any validity or be negotiated, but was based on the fact that the statute required the certificate of registration to be endorsed on the bonds, the court holding that such endorsement was necessary as a part of the execution of the instrument, and citing with approval McGarrahan vs. Mining Co., 96 U. S., 316.

In that case the question was whether a patent for land had been properly executed. The statutes required that such patents be signed in the name of the president, sealed with the seal of the general land office and countersigned by the recorder, and the court held that until all these things had been done, the United States had not executed a patent. The patent under consideration had been signed by the president, was sealed with the seal of the general land office, but was not countersigned by the recorder, and the court held that the execution was not complete, saying, "each and every one of the integral parts of the execution is essential to the validity of the patent. They are of equal importance under the law, and one can not be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulation would constitute a valid grant, but what the statute requires."

The above case, of Anthony vs. Jasper County is approved in Hoff vs. Jasper County, 110 U. S., 53, and in Louisiana vs. Woods, 102 U. S., 294.

In the latter case the city had fraudulently dated the bonds back beyond the time when the statute requiring registration was passed, and having put the bonds on the market as instruments not requiring registration, the court held that it was liable for the amount of money it received for the bonds.

The case of Anthony vs. Jasper County is also cited with approval in Bissell vs. Spring Valley Township, 110 U. S., 162, in which case it was also held that where the law required bonds of a township to be attested by the county clerk, the signature of such officer is essential to the valid execution of the bonds, even though he had no discretion to withhold it, and the bonds issued without his signature are not the bonds of the township.

It is also cited with approval in Coler vs. City of Cleburne, 131 U. S., 162, and in Young vs. Township of Clarendon, 132 U. S., 340.

The doctrine announced in Anthony vs. Jasper County, and its application in the other cases to bonds in the execution or registration of which various officers were required to perform some act, directly sustains our contention that the bonds in controversy could not become a legal obligation until the certificate of registration of the city treasurer and comptroller of the state were endorsed thereon. The omission of either of these certificates prevented the bonds from taking effect as outstanding obligations. There was not even claimed to be any endorsement of registration by the city treasurer This omission raises the question fully, and it is immaterial as to the endorsement of the comptroller. We think, however, that the words "Registered March 28, 1885, William J. Swain, Comptroller," were not a compliance with the state statutes. The comptroller was by statute required to have a seal of office and to use the same "in the authentication of all his official acts except warrants drawn on the treasury of the state." The certificate upon bonds to be such as required by law must be authenticated by his official seal. The seal was as necessary, if not more so, than his signature.

SIXTH PROPOSITION.

The failure of the city treasurer and of the comptroller to endorse respectively their certificates of registration on the bonds at least destroyed the negotiability of the bonds and put plaintiff upon notice of the defense alleged in defendant's answer and found as a fact by the trial court—that the ordinance printed on the bonds required that they be sold at not less than par and the proceeds devoted to the construction of a system of waterworks, while in evasion of the ordinance the bonds were exchanged for a system of waterworks worth much less than the face of the bonds.

The section of the ordinance requiring that the bonds be sold at not less than par and the proceeds devoted to the construction of a system of waterworks is set out in the

preliminary statement above. The court found as a fact that the city council attempted to sell the bonds for cash, and were unable to do so; that a responsible party offered to build a system of waterworks for $25,000 in cash, but was unwilling to take the $40,000 bonds in payment; that afterwards the city council awarded the contract to another bidder who was willing to build a system of waterworks at the nominal price of $40,000, and accept the bonds in payment. And the court further finds "the city officers paid for the waterworks in bonds, because they had been unable to sell the bonds for money; the bonds were not considered good for their face value; if they had been so considered the waterworks would have been constructed for less." (Tr. 31 and 32.) The decisions discussed under the first proposition above certainly go to the extent of holding that the defects mentioned in the bonds under consideration destroy their negotiability, and subject them in the hands of any subsequent holder for value to the same defense as might legally be interposed to them in the hands of the person to whom they were originally issued and delivered. The only question then is what was the effect of exchanging the bonds for property worth materially less than their par value contrary to the provisions of the ordinance printed on the bond? We think Scipio vs. Wright, 101 U. S., 673, and Thompson vs. Perrin, 103 U. S., 806, and the authorities referred to in these cases are conclusive. The courts in these cases directly hold that the bonds issued under such circumstances are unenforceable in a suit at law.

SEVENTH PROPOSITION.

At the time of the issuance of the bonds mentioned in plaintiff's petition the only legal existing City of Lampasas was the defendant with boundaries fixed by its charter of 1873, and at the time of such issuance the property within such boundaries was in value about one million dollars, and the levy and collection of a tax of 25 cents on each one hundred dollars in value of such property would not then,

or at any time since, produce enough revenue to pay the interest on said bonds and create a sinking fund of at least two per cent., and such issuance of bonds was therefore illegal, as being in violation of section 9 of article 8 and section 7 of article 11 of the Constitution of the State of Texas, and no subsequent change in defendant's boundaries or increase in its territory or taxable property would render such bonds valid.

The question presented by this proposition was not in the case of City of Lampasas vs. Talcott decided by the Circuit Court of Appeals, and referred to above because the pleadings in that case, as in this, did not indicate that either plaintiff or defendant considered that the bonds were issued by the City of Lampasas under its charter of 1873, but in the opinion of the Circuit Court of Appeals in that case it was held that the bonds were issued by the City of Lampasas as created by the special act of 1873, the court saying "The dominant question in the case is: Had the corporation, at the date of these bonds the right to issue them. * * * * The officers representing the city in the issuance of the bonds believed that they were clothed with authority by the procedure of 1883. In this they were mistaken. The charter of 1873 was still in existence. It authorized the election of officers of the city. These officers had been elected. Although they believed that they held office under the new organization, they were officers de facto of the city, actually filling places created by the special act of 1873. * * * * The bonds, we hold, were not made invalid by reason of the illegal effort at incorporation made in 1883." Under our third proposition we have stated our reasons for believing that the Circuit Court of Appeals was in error in holding that persons holding offices not provided for in the act of 1873 and not pretending to act thereunder could be de facto officers of defendant. If, as stated in the opinion, the charter of 1873 was still in existence, then, of course, the city only included the territory de-

scribed in the charter, and if the property within that territory was not of such value as would authorize the issuance of the bonds, the issuance thereof was illegal. The amount of bonds which a city can issue is controlled or limited by section 9 of article 8, and section 7 of article 11 of the Constitution of Texas.

Section 9 of article 8 of the Constitution of the State of Texas of 1876 as amended in 1883 was as follows:

"Sec. 9. The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools; shall never exceed thirty-five cents on the one hundred dollars value, and no county, city or town shall levy more than twenty-five cents for city or county purposes and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment, and for the erection of public buildings, street, sewer and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as in this Constitution otherwise provided."

That part of section 7 of article 11 of the Constitution material to the question under discussion is as follows:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon, and provide at least two per cent as a sinking fund."

To pay the interest on the bonds described in plaintiff's petition and provide a sinking fund of two per cent would require $3,600 per annum. The highest tax authorized by the Constitution was one-fourth of one per cent. To raise the amount of $3600 with a tax of one-fourth of one per cent the value of the property taxed must have been not less than $1,440,000.

The total value in 1885 of the property in the territory embraced in the boundaries of the organization of 1883; was

$1,447,200 (Rec. p. 33); this included a large amount of property that was not in the boundaries of the city chartered in 1873 and which the Circuit Court of Appeals held to be the only existing city at the time of the issuance of the bonds in 1885. The exact amount of taxable property in 1885 within defendant's limits as fixed by its charter of 1873, does not appear from the findings of the court, but the findings do show that the value of such property was less than one million dollars. They show that between 1885 and 1889 there was a great depreciation in the value of property in all portions of the territory attempted to be incorporated in 1883, and that the depreciation was greatest in that part thereof not included within the limits of the charter of 1873, (see 31st finding of the court) and that in 1889 the assessed value of the lands within that part of the territory of the organization of 1883, added to defendant's territory in 1890 was $157,915, and the value thereof, that has never been added to defendant's territory, was $68,970. (See 14th finding on pp. 27 and 28 of Record.) The value of the personal property in these portions is not shown, but the total assessed value of all property within the boundaries of 1883 in 1889 was $1,064,429 (Rec. 27 and 28). Making reasonable allowance for depreciation of the value of the real property in the organization of 1883, in the year 1885 that was not then included in defendant's boundaries, must have been considerably over $300,000, leaving the assessed value of the real and personal property in defendant's limits in 1885 to be only about $1,000,000, whereas any less amount of property than $1,440,000 would not authorize the issuance of the bonds in controversy. (Gould vs. City of Paris, 68 Tex., 517; Citizens Bank vs. City of Terrell, 78 Tex., 450 and authorities of this court therein cited.) Nor is the defendant concluded by the amount of the assessed values as certified to by the officers of the organization of 1883, because they certified only as to values of the property within the territory of that organization for which they assumed to act, and they assumed to act only for that organization.

See 23rd and first part of 16th findings. (Rec. 33 and 28.) Every person dealing with a city must take notice of its charter. The assessment rolls upon which the valuation of the property of the city was based was notice to any purchaser of the bonds that the valuation of the property within the charter limits of defendant, was much less than the value necessary to authorize the issuance of bonds to the amount of $40,000. (Citizens Bank vs. City of Terrell, above cited.) The bonds were all issued and delivered at one time (Rec. p. 20), so that if they are a binding obligation for any amount, none of them are binding obligations for the full amount thereof. The plaintiff was therefore, not entitled to recover in the present condition of the pleadings, even if he be entitled to recover in any other than an equity proceeding.

On account of the errors above assigned, the plaintiff in error asks that the judgment of the Circuit Court be reversed and that judgment be here rendered for plaintiff in error.

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APPENDIX A.

1 Sayles' Texas Civil Statutes, 2nd Edition, Title XVII.

Art. 340. Any city within the limits of this state, containing one thousand inhabitants or over, may accept the provisions of this title in lieu of any existing charter by a two-thirds vote of the city council of such city, which action of the city council shall be had at a regular meeting thereof and entered upon the journal of their proceedings, and a copy of the same, signed by the mayor and attested by the city clerk or secretary under the corporate seal, filed and recorded in the office of the clerk of the county court of the county in which such city is situated; and the provisions of this title shall be in force, and all acts theretofore passed, incorporating such city, which may be in force by virtue of an existing charter, shall be repealed from and after the filing of the said copy of their proceedings as aforesaid. Any city containing one thousand inhabitants or over, may be incorporated as such city in the manner prescribed in chapter 11 of this title relating to towns and villages; provided, that whenever the words town or village are used in said chapter 11, they shall be construed to mean city having 1000 inhabitants or over; and provided, that the application to become incorporated shall be signed by at least fifty residents thereof; and when the entry of the county judge (provided in article 514 of said chapter 11) is made with reference to a city of one thousand inhabitants or over, such city shall be invested with all the rights and powers of such cities conferred by this title. (Amendment April 6, July 30, 1881; 17 Leg., p. 115.)

Art. 343. The bounds and limits of said city shall be and remain the same as fixed and defined by the provisions of the act of incorporation substituted by the provisions of this title, provided, that said limits of said corporation may be hereafter extended by adding additional territory to the same whenever the majority of the qualified electors of said territory shall indicate a desire to be included within the limits of said corporation. (Act March 15, 1875; 14 Leg., S. S., pp. 156.)

Art. 344. The municipal government of the city shall consist of a city council composed of a mayor and two aldermen for each ward, a majority of whom shall constitute a quorum for the transaction of business, except at call meeting or meetings for the imposition of taxes, when two thirds of a full board shall be required, unless herein otherwise specified; provided, that where the city or town shall not be divided into wards, the city council shall be composed of the mayor and five aldermen and the provisions of this title relating to proceedings in a ward shall apply to a whole town or city. The other officers of the corporation shall be a treasurer, an assessor and collector, a secretary, a city attorney, a marshal and city engineer, and such other officers and agents as the city council may at any time direct.

The above named officers shall be elected by the qualified electors of said city as hereinafter provided for and shall hold their offices for two years and until the election and qualification of their successors. (Amendment April 6, June 30, 1881; 17 Leg., p. 115,)

Art. 345. An election shall be held in each of the wards of said city on the 1st Tuesday in April next after the acceptance of the provisions of this title, annually thereafter, at such place or places as the city council may direct, and of which 30 days previous notice shall be given by publication in one or more newspapers of said city. Said election shall be ordered by the city council, and in case of their failure to order the same, the mayor of the city may make such order. For the purpose of holding said election and others ordered, the city council shall appoint annually in May or earlier, in each ward some competent and suitable person who shall be the presiding officer at all elections held in his ward.

Art. 503. Whenever a majority of the inhabitants qualified to vote for members of the state legislature of any territory adjoining the limits of any city, accepting the provisions of this title, to the extent of one-half mile in width, shall vote in favor of becoming part of said city, any three of them may make affidavit to the fact, to be filed before the

mayor, who shall certify the same to the city council of said city. The said city council may by ordinance receive them as part of said city; from thenceforth the territory so received shall be a part of said city, and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and bound by the acts and ordinances made in conformity thereto and passed in pursuance of this title. (Act March 15, 1875; 14 Leg., S. S., p. 112.

The following articles are part of title 17, chapter 11:

Art. 506. When a town or village may contain more than two hundred and less than ten thousand inhabitants it may be incorporated as a town or village in the manner prescribed in chapter 11, title 17, of the Revised Civil Statutes. (Amendment March 26, 1881; 17 Leg., p. 63. See ante, article 340a.)

Art. 507. If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter shall file an application for that purpose in the office of the judge of the county court of the county in which the town or village is situated, stating the boundaries of the proposed town or village, and the name by which it is to be known if it be incorporated.

Art. 508. If satisfactory proof is made that the town or village contains the requisite number of inhabitants it shall be the duty of the county judge to make an order for holding an election on a day therein stated, and at a place designated within the town or village, for the purpose of submitting the question to a vote of the people.

Art. 509, provides for the appointment of judges and clerks of the election and makes other provisions therefor.

Art. 510 prescribes the qualification of voters.

Art. 511. On each ticket the voter must write or cause to be written or printed, "corporation" or "no corporation."

Art. 512. If a majority of the votes are cast in favor of incorporation, the officers holding the election shall make re-

turn thereof to the county judge of the county within ten days after the same was held.

Art. 513. The county judge shall, within twenty days after the receipt of returns, make an entry upon the records of the commissioners court that the inhabitants of the town are incorporated within the boundaries thereof, which shall also be designated in the entry, and a certified copy of such entry shall thereupon be recorded in the proper record of deeds of such county.

Art. 514. When the entry mentioned in the preceding article has been made the town shall be invested with all the rights incident to such corporations under this chapter, and shall have power to sue and to be sued, plead and be impleaded, and to hold and dispose of real and personal property; provided, such real property is situated within the limits of the corporation.

RESPONSE of Plaintiff in Error to the Third Point in the ~~foregoing~~ Brief of Defendant.

The act of 1895 does not purport to validate such proceedings as those under which the organization of 1883 was formed, but only purports to validate those acts whereby cities attempted to accept the provisions of the Revised Statutes in lieu of any other charter they might have. The object was to cure any irregularities in the proceedings required by article 340 to be had by the city council where it sought to adopt the provisions of the general laws relating to cities. There is nothing in the acts indicating an intention to validate the acts of the inhabitants of a territory in forming an original incorporation including the territory of an existing corporation. If the construction of the act was doubtful it should not be held to validate such proceedings as those which resulted in the organization of 1883.

In Hayes vs. Mayor, etc., of Holly Springs, 114 U. S., 120, in construing a validating act, this court said: "The intention of the legislature to confirm and ratify the subscription in question can not be ascertained, with certainty, from the language of the act, which is too vague to form the basis of so important an authority as that sought to be deduced from it. As is said in State vs. Stoll, 17 Wall., 424, if the legislature intended to do what is claimed 'it was bound to do it openly, intelligibly and in language not to be misunderstood.'"

The act of 1891 expressly provides that it shall not validate the act of any town or city in unlawfully adding additional territory to such town or city without the consent of such inhabitants so added to said town or city. This proviso would prevent the act applying to said organization of 1883, for by the proceedings resulting in said organization, to defendant's area of 553 acres was added territory of an area of 942 acres to constitute the territory of the attempted corporation of 1883 without the vote of the inhabitants of such territory. Some of the inhabitants doubtless voted on the question of incorporation as did some of the inhabitants of defendant's territory, but this did not amount to a vote

of the inhabitants of the added territory on the question of annexation. (Lum vs. Bowie, 18 S. W., 144.)

Said validating acts apply only to those cities which from the time of their attempted incorporation and efforts to accept the provisions of the Revised Statutes up to the time of the passage of the acts continued to exercise the functions of cities and were up to that time recognized as such cities by the State of Texas. By the first section of each of the acts the terms thereof, which are substantially the same in each act, are made to apply only to those cities or towns as have from and after the time of their efforts to accept the Revised Statutes and become incorporated, exercised the functions of cities and been by the state recognized as such. This language could only apply to such organizations as were exercising the functions of cities and were recognized as such by the state at the time of the passage of the validating acts. If there were any doubt as to this being the proper construction of the first section of the acts, that doubt is removed by the second section of each act, wherein it is recited as a reason for having the acts to take effect at once that "the corporate existence of many of these cities is threatened by legal proceedings by which the creditors of said city would be without remedy," etc.

At the time of the passage of the first validating act the corporation attempted to be formed in 1883 had not exercised any of the functions of a city for more than a year and had not been recognized by the state as a city since November the 4th, 1889, when the quo warranto proceedings were instituted by the state. Whether it had ever been recognized by the state does not clearly appear. About a year prior to the passage of the first of said validating acts the defendant adopted the provisions of the Revised Statutes in lieu of its charter, and at the time of the passage of said act the defendant was the only City of Lampasas that was exercising the functions of a city; if there were any irregularities in the proceedings by which it adopted the provisions of the Revised Statutes they would be cured by the validating act, which could not apply both to defendant and the organization of 1883.

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115.

Brf. of Stapler for D.

Filed Dec. 3, 1900.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 115.

THE CITY OF LAMPASAS, PLAINTIFF IN ERROR,

vs.

JAMES M. BELL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

HENRY B. B. STAPLER,
ROBERT G. WEST, AND
T. B. COCHRAN,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-3-1900

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE CITY OF LAMPASAS, PLAINTIFF IN ERROR,

AGST.

JAMES M. BELL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Before reference is made to the statement of the case and other matters contained in the brief for the plaintiff in error, the defendant in error submits to the Court this preliminary point in answer to the contention of the plaintiff in error in support of its 1st, 2d, 3d and 4th assignments of error, which will be hereafter more fully considered, predicated upon the allegations as therein set forth that

Articles 340, 506 to 513 and 503 embraced in Title XVII. of the Revised Statutes of the State of Texas (the General Municipal Corporation Law of that State) are in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States; and that, therefore, the bonds of a municipal corporation organized under such law and held by the defendant in error, *bona fide* and for value, are invalid, notwithstanding the fact that such bonds were issued under full statutory authority; were executed by the proper officials; were registered in the office of the State Comptroller; were endorsed with his certificate and were issued for the benefit of the municipality in payment for a system of water works which were built for and accepted by such municipality.

I.

The contention of the plaintiff in error is that, because the incorporation was by popular vote and no hearing was given to the residents of the territory included within the limits of the incorporation of 1883, they were (seventeen years ago) deprived of their property without due process of law, and that, therefore, the law was invalid and ineffectual to give corporate life or power to issue the bonds, and that the plaintiff in error, standing substantially in the place of the municipality creating the bonded indebtedness, is relieved from that indebtedness.

Aside from the first inquiry which at once arises—viz.: What right has the plaintiff in error to complain of the matters re-

ferred to?—it is submitted that the provisions of the statute were not in contravention of the specified prohibition of the Fourteenth Amendment.

A.

Whether a State law is violative of this provision must be determined by the inquiry whether it is in contravention (1) of the law of the land of the particular State whose law is called in question, or (2) of those fundamental rights of the individual which are within the protection of the Constitution of the United States.

Fallbrook Irrigation District vs. Bradley, 165 U. S., 112.

(1) That the provisions of the State statute here sought to be brought in question are not in contravention of the law of the land of the State of Texas is shown by the fact *(a)* that its enactment was specifically authorized by the Constitution of the State, which provides, in Article 11, Section 4 : " Cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law ; " *(b)* by the fact that the law has been upheld by the Supreme Court of the State of Texas (Graham vs. Greenville, 67 Texas, 62 ; State vs. Waxahachie, 81 Texas, 626) ; *(c)* by the fact that the law has existed for a quarter of a century ; has been acquiesced in by the people of the State as an appropriate and lawful exercise of legislative power, under which great numbers of municipal corporations have been created and vast property rights and interests have become vested.

(2) An examination of the law shows, it is submitted, that its provisions violated no constitutional rights. By the decision of the Courts of the State of Texas the law only permits the inclusion within corporate limits of urban lands. An inclusion of rural lands would render the incorporation void. The act only applies to actually settled towns and villages.

State vs. Eidson, 76 Texas, 302.

It is therefore to be observed that the case of People vs. Bennett, 29 Mich., 451, is not here applicable, for the reason that, as the law of Texas is construed by its Courts, the injustice complained of in People vs. Bennett does not exist.

The State of Texas long since adopted the method under this law by which the Legislature tendered to the inhabitants of these urban settlements the opportunity to determine by a majority vote of the electors of such settlements whether they would accept or reject a municipal charter within the boundaries of the urban settlements designated in a petition to be signed by a certain number of the inhabitants thereof. Referring to the provision allowing the annexation to a municipality of contiguous territory upon a majority vote of the persons residing in such contiguous territory,

Says WILLIE, C. Justice, in Graham vs. City of Greenville, 67 Texas, p. 65:

"But, while the legislature is not bound to obtain the assent of the persons residing within the contiguous territory before annexing it to a city, it may do so, and provide that the annexation shall not take place unless a majority of such persons shall assent thereto in some manner provided by the legislature. This is in no just sense a delegation of legislative powers, but merely a question of the acceptance or rejection of a charter" (1 Dillon on Municipal Corporations, Sec. 44, and authorities cited).

Says COOLEY on Constitutional Limitation:

"As municipal organizations are mere auxiliaries of the State government in the important business of municipal rule, the

Legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested, and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject. Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive unless for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual."

Cooley on Constitutional Limitations, pp. 138, 139, 6th ed.

It is, therefore, submitted that the method followed by the State of Texas in providing for the incorporation of settled towns and villages within urban boundaries determined by a majority vote of the inhabitants, was an appropriate exercise of legislative power in a matter peculiarly within State control.

Says Mr. Justice BREWER in Forsyth vs. Hammond, 166 U. S., 506 :

"The matter in controversy is peculiarly within the domain of State control. Kelly vs. Pittsburg, 104 U. S., 78 [26, 658]. It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their terri-

torial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and which by the very nature of things the determination of the State authorities should be accepted as authoritative and controlling. We do not mean to hold that in the creation or change of municipal boundaries there may not be action taken by the State which involves a tresspass upon rights secured by the Federal Constitution; or that in proceedings looking to such change no questions can arise which are of a Federal nature, and in respect to which the judgment of the courts of the nation must be controlling. All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the State."

Forsyth vs. Hammond, 166 U. S., 506.

In the case at bar no injustice is shown to have been perpetrated upon persons whose urban property was included in the corporate limits, and no fact presented, upon which can be predicated a claim that any wrong was done which would have been avoided by a judicial proceeding. The matter was decided by the popular will, with ample time for full discussion and consideration by the voters, and there is no evidence of any dissatisfaction with the result. Under these circumstances, it is submitted, no claim can be made that the case shows that the operation of the law was to invade fundamental rights.

The authorities relied upon in support of the contention of the defendant that a hearing should have been given are: Spencer vs. Merchant, 125 U. S., 345; Parsons vs. District of Columbia, 170 U. S., 45; Falbrook Irrigation District vs. Bradley, 164 U. S., 112.

It is submitted that the question presented by those cases differs in an essential element from that sought to be raised in the case at bar. In the cases referred to the lands were to be assessed for benefit to be derived from the particular improve-

ment provided for by the law ; unless the lands were to be benefitted they could not be justly included in the taxing district, and unless the Legislature itself defined the district, in which case it was presumed the question of benefit had been justly determined, and the determination of the district was left to subordinate agencies, it was held that the landowner was entitled to be heard upon the question whether his lands were to be benefitted. The question involved was necessarily a judicial question, involving private rights of property.

No such question, it is submitted, is presented in the case at bar. A municipal corporation is an instrument of government. Its organization is not predicated upon any benefits accruing to the property included within its territorial limits, but upon the benefits to the public from the organization of an arm of the government to administer certain powers of government over a certain territorial area. What territory is to be included within the scope of the authority of such governmental agency of the State and how the boundaries of such territory are to be determined it is submitted is a question of expediency with the Legislature of the State, and while judicial questions may grow out of such proceedings in which the protection of the constitution may be invoked for the preservation of fundamental rights, before a law can be condemned it must be shown in a given case, it is submitted, that it works grave injustice and imposes unjust and unlawful burdens, and such evidence is wanting in this case.

B.

But, further, it is submitted that the plaintiff in error is not entitled to raise the question of the unconstitutionality of the legislation referred to. Even if, in any view of the matter, that legislation could be regarded as an invasion of any rights of the individuals whose lands were included in the territorial limits of the municipal corporation issuing the bonds, such a

defense cannot be interposed by the plaintiff in error here. Seventeen years have passed since such incorporation and no person affected thereby has ever complained. All acquiesced; the statute of limitations has long since run. The matter cannot now be inquired into by those directly affected by the proceedings in question, much less by the plaintiff in error.

Says COOLEY:

"A party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property" (Cooley's Statutory Limitations, p. 196, 6th Ed.).

Says the same author:

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Stat. Limitations, 6th Ed., 196.
Supervisors vs. Stanley, 105 U. S., 305.
Clark vs. Kansas City, 176 U. S., pp. 114–118.

C.

The attention of the Court is called to the fact, as pointed out *infra*, page 6, of this brief, that all the question, presented by the assignments of error, with the exception of the constitutional question sought to be raised here, have been adjudicated against the plaintiff in error upon practically identical findings of fact in the suit brought on behalf of Mr. James Talcott, a holder of other bonds of the same issue above referred to, by the judgment of the U.S. Circuit Court of Appeals for the Fifth Circuit and which judgment, upon an application for a writ of *certiorari* in the month of May last, this Court declined to review.

City of Lampasas vs. Talcott, 94 Fed. Rep., 457. Same case 36 U. S. Circuit Court of Appeals, 38. Application for

writ of *certiorari* denied by this Court in May, 1900, 178 U. S., p. 612.

It was held in this case that plaintiff in error, standing substantantially in the place of the corporation issuing the bonds, was liable for the debt upon the bonds.

It is respectfully submitted that the precedent of this case should control the disposition of the case at bar, which further, it is submitted, is directly within the rule of Shapleigh vs. San Angelo, decided by this Court in May, 1896.

Shapleigh vs. San Angelo, 167 U. S., 646.
City of Lampasas vs. Talcott, 36 U. S. Circuit Ct. of Appeals.
Uralde vs. Spier, 33 U. S. Circuit Ct. of Appeals, 501, 38.
Mobile vs. Watson, 116 U. S., 289.

II.

The defendant in error, while admitting that the statement of the case contained in the brief for the plaintiff in error is substantially correct, desires to submit that in some of its details it is incorrect and the same is hereby controverted in the following particulars:

In the second and third paragraphs of the petition of defendant in error it was alleged that the City of Lampasas was a municipal corporation duly chartered under the laws of the State of Texas, and that as such it was authorized by its charter to construct waterworks and to issue bonds for the purpose of making such improvements; and in the fourth paragraph it was alleged that by virtue of the powers conferred upon it by its charter, and by the laws of the State of Texas, it passed the ordinance under which the bonds in suit were issued and sold,

and the substance of this ordinance was pleaded in the fourth paragraph. It was alleged that the bonds were duly registered by the treasurer of the City of Lampasas, by his signature endorsed thereon, and by the Comptroller of the State of Texas, and a certificate to that effect was endorsed thereon.

Plaintiff in error, in setting out the findings of fact and conclusions of law by the Circuit Court, omits the sixth finding, to the effect that the City of Lampasas, after the incorporation by vote of the people in 1883, became a thriving municipality with a population of about 5,000 during the years 1884 and 1885. The twenty-third finding is also omitted, wherein it appears that when the bonds in suit were presented to the Comptroller for registration a written statement was made by the Mayor and Secretary of the City of Lampasas certifying that the assessed value of all property situated within the limits of said city as shown by the tax rolls for the year 1884 was $1,447,200. In printing the 27th finding the fact that the stand pipe was located within the charter limits of 1883 is omitted, and defendant in error desires to add the 33d finding as showing affirmative proof by him that he had become the owner of the bonds, from which the coupons sued upon were detached, in the year 1887, prior to the institution of the *quo warranto* suit against Largen in 1889, as follows:

" 33rd. The plaintiff in 1887 obtained the bonds, the coupons of which are sued upon, from the estate of his father, who had purchased them from Nelson & Noel, brokers of St. Louis, Missouri."

We deem it proper also to state in this connection that this suit involved a part of the same bonds involved in the case of City of Lampasas vs. Talcott, in which a judgment in favor of Talcott, rendered by the Circuit Court for the Western District of Texas, was affirmed by the Circuit Court of Appeals for the Fifth Circuit, May 9, 1899. The opinion of said Circuit Court sustaining the validity of the bonds will be found in 94 Federal Reporter, page 457, and an attempt to remove the case to this court by *certiorari* was refused.

Defendant in error controverts the statement of his supplemental petition as made by plaintiff in error and for better knowledge of the facts and law therein presented will here print the same as follows:

1st. That if any question can arise as to which charter the City of Lampasas was acting under in January and March, 1885, when said city issued and placed upon the market its negotiable bonds and coupons, a part of which are herein sued upon, then this plaintiff says that said city had full authority under either charter to issue said bonds and coupons in this, that the special charter granted to defendant as pleaded by it expressly authorized defendant among other things to construct waterworks and to issue bonds to pay for such public improvements, and if it be held that the City of Lampasas as existing in 1885, does not now exist, a proposition which plaintiff denies, then plaintiff says that the mayor and city council which did issue such bonds, were acting in good faith as officers of the City of Lampasas, assuming full authority so to do, without dispute by the State of Texas, and as such were de facto officers of said city and acting as they did in the exercise of a power conferred upon them in said special charter, their acts bind the defendant now existing and the coupons sued upon are valid obligations of said defendant, and as such plaintiff prays judgment thereon.

2nd. For further special reply said plaintiff alleges that by the act of adopting the general charter in 1883 by vote of the people who resided and did business in said town or City of Lampasas and were citizens thereof following urban pursuits, such action on the part of the people by this act of exercising a delegated legislative power, thereby made such city a valid corporation under said general charter, notwithstanding the said special charter and that to the extent of the limits fixed in this general charter the City of Lampasas became and has ever since been a legally existing corporation and that all lands and property within said limits, are now within the jurisdiction of the City of Lampasas, and if de-

fendant's officers are not assuming jurisdiction over said entire limits that their failure so to do in no wise effects the validity of plaintiff's coupons, and he prays judgment establishing his said debt as against the corporation with the full limits existing in 1885, when said debt was created.

3rd. Plaintiff specially denies that the judgment of ouster pleaded by defendant as occurring in 1890 by the suit of the State vs. Largen, et al, has any binding force whatever, but is an absolute nullity because the holders of the waterworks bonds and of the coupons herein sued upon were not made parties to said suit, and because to give said judgment effect would be to declare that the state could destroy the corporation and with it the agencies existing when said contracts were made to assess and collect the special tax levied as part and parcel of said contract as a means of paying said bonds and coupons, and thereby impair the obligations of a contract in violation of the constitution of the United States and of the State of Texas; plaintiff prays judgment accordingly.

4th. Plaintiff further alleges that whatever may have been the legal effect of said judgment of ouster, the defendant City of Lampasas immediately after said Largen and others abandoned their said offices, proceeded to reorganize its city government under its said special charter, and that its mayor and city council again met on March 19th, 1890, for the first time under this reorganization, and on March 22nd, 1890, said city council duly passed a resolution to abandon said special charter and to adopt in lieu thereof the same general charter under which it had been acting from 1883, and that thereafter on December 26th, 1890, by proper vote duly and legally had and certified by persons living within what was known as the Lampasas Springs First and Second Additions to the town of Lampasas, the said city council added the principal part and substantially all of the inhabited portion of that part of the territory embraced within the incorporation of 1883, which was outside of the limits fixed in the charter of 1873. And plaintiff alleges that the business part

of the City of Lampasas has at all times been within the special charter limits of 1873, and that within this area nearly all persons living in said town, whether within the charter limits of 1883 or in the fifteen or twenty additions laid out into city lots, part of which are outside of said limits, have at all times done business following urban pursuits, and that after attaching the additions in December, 1890, fully ninety per cent of the population and a like large proportion of the tax values of said incorporation as existing from 1883 to 1890 were brought within the City of Lampasas as claimed by defendant, and there was also brought within said limits the system of waterworks, all bridges, graded streets and other property of said city government of 1883. Wherefor plaintiff says that by this act of reorganization and attaching additional territory, the City of Lampasas within this restricted area in any event became the lawful successor of said pre-existing de facto organization and as such succeeded to the ownership of said system of waterworks and its other properties and become bound for all of its debts including the coupons here sued upon and as such plaintiff prays judgment.

5. Plaintiff further alleges that whatever may have been the vice or irregularity in the adoption of the charter in 1883 by the vote of the people, the citizens and tax payers of said City of Lampasas acquiesced in the acts of their officers in constructing a system of waterworks and in issuing its negotiable bonds to pay for the same and that by such acquiescence in the act of their said officers all persons embraced in said limits became and are estopped to deny the validity of said bonds and that by permitting said corporation to exist and to issue its negotiable bonds in payment of a system of waterwork and by the registration thereof by its comptroller, the proper executive officer of the state appointed by law for such purpose, the State of Texas lost its right to interfere in any manner with said City of Lampasas in its proprietary or private rights connected with the ownership of said waterworks and its rights and duties to assess

and collect the taxes specially contracted to be levied to pay said bonds and that any attempt by the state to interfere therewith would be void as impairing the obligation of the contract and plaintiff here pleads that whatever effect the proceedings of ouster against Largen et al., may have been in other respects it has no binding force or effect as against plaintiff as the holder of its coupons connected with said bonds.

Plaintiff further alleges that at the first session of the legislature after the decision was rendered in the said Largen case, said legislature having full power and right so to do, did pass two acts in substance and effect validating all acts done by cities and city councils acting as de facto corporations and also validating their charters, and plaintiff here pleads said validating acts in aid of his said coupons and says the same validated and cured any vice or irregularity existing in defendant's charter of 1883, and that upon the passage of said acts defendant's officers were vested with full authority over all territory embraced in said charter of 1883, and now have such authority and should exercise the same in accordance with law and plaintiff prays judgment accordingly.

FIRST POINT.

It is respectfully submitted that this court is without jurisdiction of this case, because the attempt to raise the issue of the constitutionality of the general laws of Texas, by which all municipal corporations having less than 10,000 inhabitants are chartered, is a fictitious issue and is merely a colorable attempt to confer jurisdiction upon this court in order to overcome the unfavorable judgment of the Circuit Court of Appeals for the Fifth Circuit in the companion case of Talcott vs. City of Lampasas entered prior to the rendition of the judgment in this case.

The defendant in error does not question the right of this court to entertain jurisdiction if the issue of the constitutionality of the statute of Texas is properly drawn in issue, but

we contend, that the attempt to raise the issue of constitutionality of said general law is fictitious and colorable and that this court should not entertain jurisdiction of the case. (Penn. Mutual Life Insurance Company vs. City of Austin, 168 U. S., p. 695.)

That the validity of the bonds involved in this suit was directly in issue in the case of Talcott vs. City of Lampasas, it will be seen by comparison that the findings of fact contained in the record in this suit, so far as they are presented in the briefs of counsel for plaintiff in error, are identical with those presented in the Talcott case, with the additional statement in the 25th finding, that in the Talcott case it was not shown what bond was exhibited to Hedeman, in the present case, it is affirmatively found that none of the bonds of defendant in error were so presented, and furthermore, in the present case it was affirmatively shown that defendant in error had become the owner of his bonds in due course of trade prior to the time that the suit of the State vs. Largen was instituted.

While we do not desire to be considered as taking the absurd position that because this court may overrule the contention of the plaintiff in error as to the constitutionality of the statute that for that reason the court has not jurisdiction of the entire case, still we believe it is proper in considering the question as to whether the issue of constitutionality is real, or is merely colorable and fictitious, to call attention to our second point presenting that issue.

SECOND POINT.

The Constitution of the State of Texas which took effect April 18, 1876, having provided that cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law and the legislature having by act of March 15, 1875, enacted a general charter under which all municipalities in the state have been incorporated for a period of twenty-five years, and the highest court of the state having in many cases considered and approved of the said

legislative enactment, this court should not sustain the plea of unconstitutionality interposed by plaintiff in error.

In support of the foregoing proposition we submit the following:

By the Constitution of the State of Texas, Article 11, Section 4, it is provided, "Cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law."

Section 5 provides that "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature."

The above extracts are from the Constitution framed by the convention of 1875 which was adopted March 24, 1876 and took effect April 18, 1876.

Under previous constitutions many special charters had been granted to small towns and cities and on March 15, 1875, the legislature enacted a general charter which will be found on pages 113 to 156 of the acts of 1875. The title of this act was as follows: "An act regulating the incorporation of cities of 1000 inhabitants or over and to provide for the substitution and repeal of all acts heretofore passed incorporating such cities which may be in force by virtue of any existing charter."

In the codification of laws by official commission this act was incorporated in the Revised Statutes of 1879 as Title XVII under the head of "Cities and Towns." This law was continued in force by virtue of section 48 of article 16 of the general provisions of the Constitution of 1875 and it has remained in force with minor amendments up to the present time.

The first amendment to be adopted was the act of April 6, 1881, wherein it was provided, that when a town having 1000 inhabitants or over desired to incorporate it could be done upon the petition of fifty resident citizens in the same manner as provided for the incorporation of towns or villages with less than 1000 inhabitants. In other words under the act of 1875, made Title XVII of the Revised Statutes,

a defect was found in that no provision was made for the incorporation of what the law denominates a city of 1000 inhabitants or over, the law previously permitting only such corporations as were chartered by special act to surrender their existing charters and accept the general charter in lieu thereof and this amendment was made to remedy the defect. The next amendment was that of March 27, 1885, wherein it was provided that if the municipality was chartered as a town or village and not as a city, it could accept the general charter for cities of 1000 or over, when its population was sufficient. This amendment was enacted to cure the apparent defect in section 340 which extended the privilege of the general charter only to municipalities incorporated by the name of "*city*."

Article 340 as originally printed in the Revised Statutes of 1879 is identical with the first clause of article 340 as printed in the brief of plaintiff in error. The amendment of 1881 is contained is the second clause of said article. We call attention to the amendment of 1885 without printing it simply for the purpose of giving an historical account of the law and the amendments enacted to cure the defects therein as will appear from the different cases cited.

It will be seen that where a special charter had been granted to a city, the technical mode for surrendering the same and adopting the general charter, was by action of the city council and not by vote of the people. The first case to go before the Supreme Court of the state on this point was the case of State vs. Dunson (71 Texas, 65), decided June 12th, 1888, wherein the court held that because the City of Nacogdoches did not pursue the method pointed out and adopt the general charter by act of its city council, although it had attempted to do so by general vote of the people, that the incorporation was for that reason invalid. We copy the following extract from the opinion found on page 71:

"There is no doubt that the legislature might have provided that the inhabitants of an incorporated town might, by a majority vote, accept incorporation under the general

law as was done by the Act of January 27, 1858, and thereby repeal the former charter; and it would seem that this would be more in harmony with the spirit of our institution than is the mode provided by Article 340 of the Revised Statutes. This was, however, a matter for the consideration of the legislature and a town or city already incorporated and desiring to re-incorporate under the general law must, to accomplish that, follow the mode now prescribed."

The next case was that of Buford vs. State reported in 72 Texas, 182, and these cases were followed in the case of Largen vs. State (76 Texas, 323), which was an action to dissolve the corporation of the defendant in error, the City of Lampasas. These are the only three cases wherein there has been special charters granted by the legislature which had become dormant and in each it will appear, that there was an honest effort to adopt the general charter, by vote of the people, instead of following the technical and formal method pointed out, of reorganizing the dormant corporation by the election of a city council and have it adopt the general charter.

In the case of Harness vs. State (76 Texas, 566), the same principle was announced as applied to a municipality incorporated as a village and an attempt by it to abandon that incorporation and to incorporate as a city of 1000 inhabitants or over, prior to the amendment of 1885, which for the first time authorized such towns and villages to adopt the general charter for cities.

We desire to call the attention of this court to the declaration of the Supreme Court as found in that opinion on page 572:

"There is much confusion in the statutes providing for the incorporation of cities, towns and villages and their revision is required for the public welfare, but the courts have simply to enforce them as they are found. Municipal corporations can be created only in the manner provided by law and when created must continue until abolished in some legal method. We see no reason why it should not be provided that a vil-

lage corporation might give up its corporate existence in the very act of incorporating as a city under the provisions of Article 340 and 340a, Sayles' Civil Statutes, as well as by pursuing the course pointed out in the succeeding article, but the legislature has not seen proper to permit this to be done."

The next case which we desire to call to the court's attention is that of the State vs. Eidson (76 Texas, 302), which is the first authoritative construction placed by our Supreme Court upon what is meant by the power conferred upon the people of a town, village or city, to incorporate under this general law. That decision is in point, and as we contend controlling upon this court as to the constitutionality of the law. It will be seen that the Supreme Court of Texas holds that those who seek to incorporate a municipality must carefully observe the lines which mark the boundaries of the urban population. We quote from that part of the opinion found on page 305 as follows:

"It is only *towns* and *villages* authorized to incorporate under that chapter which are authorized to incorporate for school purposes only. (Sayles' Civ. Stats., Art. 541a.) The Revised Statutes authorize towns to establish a corporation by an election, provided they contain more than two hundred and less than ten thousand inhabitants. (Art. 506.) No definition of the word 'town' is given, and it follows we must take the word in its ordinary signification—a collection of inhabited houses. The term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support. A section of country so inhabited can not be called a town, nor treated as a part of a town, without doing violence to the meaning ordinarily attached to that word.

"It follows from this that the legislature did not intend to

confer the power of incorporating by election upon a district of country inhabited by people living in residences widely disseminated over its area. The power is conferred only upon towns and villages, and is confined to the actual residents of such localities, and does not carry with it and confer upon a town, authority to extend the boundaries of the corporation beyond its own actual limits."

Following the Eidson case is the case of State vs. Town of Baird reported in 79 Texas, 63, and from the opinion in that case we make the following extracts:

"It is insisted that the incorporation should have been confined to the town as laid off into blocks and lots. But we think otherwise. A town may exist without being divided into lots; and on the other hand, neither naked blocks or lots, whether with or without a map, constitute a town. If the population extended beyond the platted portion of the town, such extention was properly embraced within the limits of the incorporation."

"But as intimated in the State vs. Eidson, 76 Texas, 302, it may not always be practicable to incorporate a town without including within its limits some territory devoted purely to pastoral or agricultural pursuits. Something may be allowed for prospective expansion. In a case like that just cited (The State vs. Eidson), where there has been a clear abuse of the incorporating power conferred by the legislature, the courts should not hesitate to dissolve the alleged incorporation. But it would not do to annul such municipal corporation created by an election under the general law upon proof of the inclusion within its limits of a small strip of agricultural land. The effect of such ruling would probably be to annul the charters of many growing and thriving towns in the state which are acting as incorporations under the general laws,—a result it is to be presumed the legislature did not contemplate.

"In case of a clear abuse of the power to fix the corporation limits in an attempt to incorporate under the general law the courts should not hesitate to annul. But we do not

think such abuse has been shown in this case. Therefore we can not say that the court erred in holding under the facts in evidence that the town of Baird was legally incorporated.

"The judgment is affirmed."

In the case of Ewing vs. State, reported in 81 Texas, 172, the supreme court in construing the right of the petitioners to designate boundaries and fix the limits of the proposed corporation follow the case of State vs. Eidson, and we quote from the opinion found on page 177 the following:

"The corporation in the present case was attempted to be created under Article 340a of Sayles' Civil Statutes, which article reads as follows: 'When a city or town may contain 1000 inhabitants or over, it may incorporate as a city or town in the manner prescribed by chapter 2 of this title,' etc. It follows that the manner of incorporating towns and villages for school purposes, and for incorporating cities, towns and villages for municipal purposes, are precisely the same; and that if a town is not authorized to embrace within the limits of its corporation for school purposes territory beyond the limits of the actual town, a city when it seeks to create a corporation for municipal purposes must confine itself to its actual boundaries. This is the literal meaning of the statutes upon this subject. Who are empowered to create corporations? The inhabitants of cities, towns and villages. What are they empowered to incorporate? The cities, towns and villages themselves, and not also such portions of the adjacent territory as their inhabitants may be pleased to embrace within the limits of the corporation.

"But it is insisted that the boundaries of a municipal corporation is a question to be determined by the legislature and not by the courts. This may be true as to such municipalities as have been or may be established by special legislative enactments. It was so held by this court in Norris vs. The City of Waco, 57 Texas, 635. So also if the legisla-

ture had provided that the cities proposing to incorporate under the general laws should be empowered to embrace territory lying beyond their actual limits it may be that in the clear abuse of the power it would be the duty of the courts to respect the legislative will and to hold an incorporation including such additional territory valid. But as we construe the law no such power has been granted, and the question we have is, whether or not the action taken by the inhabitants of Oak Cliff in attempting to incorporate their city is such as the legislature empowered them to do or not. This is a judicial and not a legislative inquiry."

From the foregoing it will appear that the authorized construction by the Supreme Court of Texas, of the general incorporation laws of the state, limits and restricts the boundaries to such land as may be used by persons following urban pursuits and excludes such lands as are occupied by agriculturists. As held by the court in the Ewing case, those who seek to fix the boundaries act at their peril, and their action is not final. The question remains open for judicial inquiry by any person who feels himself aggrieved at being included within the proposed municipality.

We submit that the theory on which the case of People vs. Bennett, 29 Michigan, 451, was decided, has no application to the case at bar.

As pointed out *(supra)*, the Courts of the State of Texas hold that, under the general incorporation laws of that State, the inclusion of rural lands within the proposed boundaries of a municipality to be incorporated render the incorporation invalid.

State of Texas vs. Eidson, 76 Texas, 302.

While on this point we deem it proper to suggest the evil

consequences and far reaching effect of a decision by this court, after a statute has been in force for twenty-five years conferring the right of municipal incorporation, to hold such statute unconstitutional and strike down municipal governments formed thereunder. On this point we beg to suggest that in the report of the tax commission of the State of Texas created by Act of March 1, 1899, and which was composed of the governor, comptroller, state revenue agent and another commissioner, in Appendix B to their official report submitted to the legislature of the state in December, 1899, the bonded debts of 114 towns and cities incorporated under the general laws of the state are set forth and show such bonded indebtedness, so far as reported to them, to amount to $2,514,600.00. By way of explanation as to the above figures we will state that from the recapitulation found on page 372 of the report we have deducted the indebtedness of the ten cities having a population of 10,000 inhabitants or more and which are chartered by special acts. In addition to the evil to ensue from holding this indebtedness to be illegal, it is unnecessary to mention the great embarrassment and confusion that would follow the destruction of all municipal government in these smaller cities.

In the question of extension of boundaries as provided for in Article 503 copied on page 60 of the brief of plaintiff in error there have been two decisions rendered by the supreme court of Texas. The first case is that of Graham vs. Greenville, 67 Texas, 62, in which this article was sustained. This case was followed in State of Texas vs. Waxahachie, 81 Texas, 626, and it will be seen that under the second proposition in the brief for the state, that the point was made that the law providing for the incorporation of cities and towns was inoperative because the legislature had failed to provide any authority or mode for ascertaining or fixing the boundaries, and the case of People vs. Bennett, 19 Michigan, 451, was cited. The court without reviewing the question upholds the statute.

THIRD POINT.

have from and after the dates of their several attempted incorporations

Conceding the irregularity of the incorporation of the City of Lampasas by vote of the people in 1883, the same was cured by the validating act of the legislature of March 2 1891, and by the subsequent validating act of March 30 1895, and such corporation with the boundaries therein fixed became and now is a valid and subsisting municipality entitled to all property rights and privileges and charged with the payment of all obligations incurred by it prior to such validation.

The validating act of March 2nd, 1891, above referred to is as follows:

"Article 340c. That all towns and cities of one thousand inhabitants or more which have heretofore attempted to accept the provisions of this title and to become incorporated cities of one thousand inhabitants or more, under the general laws of Texas, and have failed to comply with all the requirements of said general law, or which are not included within the literal meaning of those cities which are authorized to accept the provisions of said general law, and all towns and villages incorporated under chapter 11 of the Revised Civil Statutes or by special charter or otherwise, but which now have one thousand inhabitants or more, and which have heretofore attempted to accept the provisions of this title in lieu of their said town or village charter and become incorporated cities of one thousand inhabitants or more; but which said cities and their several efforts to accept the provisions of this title exercised the functions of cities of the class named, and were by the State of Texas recognized as such cities, be and the same are hereby declared to be cities of one thousand inhabitants or more, and the several acts whereby they attempted to accept the provisions of said law are hereby in all things validated. And that all subsequent acts of said cities and towns done and performed as a city of one thousand inhabitants or more, after they had attempted to accept the provisions of said law as aforesaid, be and the same are hereby validated and declared to be as

binding as if said cities has been duly and legally incorporated, provided, that nothing herein shall be construed as validating any act of said cities or the councils thereof, unless same were authorized by the general laws of the state under which they were attempting to act, at the several dates when said acts were done, and provided further, that the provisions of this act shall not validate the act of any town or city in unlawfully adding additional territory to such town or city, without the consent of such inhabitants so added to said town or city.

"Sec. 2. Whereas there are many cities in Texas of one thousand inhabitants or more which have heretofore attempted to accept the provisions of the general law as stated in the preceding section of this article, and have attempted to incorporate themselves, but have failed to comply with the provisions thereof, but have nevertheless been recognized as cities, and have borrowed money, incurred debts, purchased property and levied taxes, built school houses and engaged in many different enterprises for the public good; and whereas the corporate existence of many of these cities is threatened by legal proceedings by which the creditors of said city would be without remedy, and the public interest greatly injured, therefore an emergency and an imperative public necessity exists for the suspension of the constitutional rule requiring bills to be read on three several days, and the same is hereby suspended and this act take effect from and after its passage and it is so enacted."

The validating act of March 30th, 1895, is as follows:

"Sec. 1. Be it enacted by the Legislature of the State of Texas: That all cities or towns of one thousand inhabitants or over which have heretofore attempted to accept the provisions of Chapter 1, Title 17, of the Revised Civil Statutes, and which have attemepted to be incorporated under the provisions of said general law, but which said attempted incorporation is invalid by reason of the failure of said cities or towns to comply with all the requirements of law relating to the incorporation of towns or

villages, but which said cities or towns have from and after the dates of their several efforts to accept the provisions of law relating to the incorporation of cities or towns of one thousand inhabitants or over, exercised the functions of cities or towns of the class named and been recognized as such cities or towns be and are hereby declared to be cities of one thousand inhabitants or over, and their incorporation as such is hereby in all things validated: Provided, that nothing in this act shall be held to validate the incorporation of cities or towns that had less than one thousand inhabitants at the time of their attempted incorporation as such cities or towns of one thousand inhabitants or over.

"Sec. 2. Whereas, there are many cities in Texas of one thousand inhabitants or more which have heretofore attempted to accept the provisions of the general law as stated in the preceding section and have attempted to incorporate themselves but have failed by reason of the failure of said cities to comply with all the requirements of law relating to the incorporation of towns and villages, but have nevertheless been recognized as cities and have borrowed money, incurred debts, purchased property and levied taxes, built school houses and engaged in many different enterprises for the public good; and whereas, the corporate existence of many of these cities is threatened by legal proceedings by which the creditors of said cities would be without remedy and the public interest greatly injured, therefore an emergency and an imperative public necessity exists for the suspension of the constitutional rule requiring bills to be read on three several days, and the same is hereby suspended, and this act take effect from and after its passage, and it is so enacted."

It will be observed that the first validating act above quoted was passed in 1891 which was at the first session of the legislature after the supreme court had in the Harness case (76 Tex. 562) suggested the necessity of some legislation upon the subject. It is worthy of note that the Harness

case was the third at the same term wherein municipal corporations were held to be invalid on mere technical grounds, and it is but natural to find the legislature coming to the rescue to avoid the wholesale repudiation of debts which was being attempted in this way. One of the three cases being the Largen case wherein the plaintiff in error sought to escape liability upon its debts by having its charter taken from it.

We therefore rely upon these validating acts as curing any vice or infirmity in the bonds sued upon.

FOURTH POINT.

As the citizens of the City of Lampasas had permitted the organization under the special charter of 1873 to lapse and to remain dormant from 1876 to 1883, the organization at last named date by vote of the people, created a de facto government in every respect regular except as to the method by which it was organized, and since the additional territory did not exceed in width the half mile permitted to be added under the term of the general charter, and this de facto organization being recognized by the state and permitted to issue negotiable bonds, and through its comptroller having registered the same, the state could not thereafter strike down such de facto municipality, without making provision for the payment of the debts incurred by it in good faith. We further submit that the judgment in the case of State vs. Largen, was not binding upon the defendant in error and other bond holders who were not made parties thereto.

The statement in the foregoing proposition that the additional territory embraced within the incorporation of 1883 did not exceed a half mile in width, is shown by the 7th finding of fact. Article 503 of the general charter, copied on page 60 of brief for plaintiff in error, permits territory to be added to any municipality to the extent of a half mile in width.

That defendant in error and other bond holders were not parties to the judgment in theLargen case is shown in the 9th finding. That such a judgment would not affect the rights of such bond holders, we cite the case of Morris vs. State, 65 Texas, 59, and New Orleans Water Works Company vs. New Orleans, 164 U. S., 471.

That the officers who were elected under the organization of 1883 were de facto officers of the City of Lampasas even if it be held that we must look alone to the charter of 1873, we cite the cases of State vs. Hoff, 88 Texas, 297, State vs. Goodwin, 69 Texas, 55.

That the principle of estoppel is applicable to a quo warranto proceeding instituted by the state to set aside a de facto corporation after it has incurred debts, we cite the cases of Railroad Company vs. Commissioners, 48 Kansas, 70; State of Wisconsin vs. Janesville Water Power Company, decided March 10, 1896, reported in 32 Lawyers' Reports Annotated, page 391; State of Iowa vs. City of Des Moines, decided January 21, 1896, found in 31 Lawyers' Reports Annotated, page 186; People vs. Alturas County, decided by the supreme court of Idaho, January 14, 1889, reported in 44 Lawyers' Reports Annotated, page 122; and Comanche County vs. Lewis, 133, U. S., page 198.

FIFTH POINT.

Since the bonds in suit were issued prior to the decision of the supreme court in the case of State vs. Dunson, 71 Texas, 65, which is the first case wherein the State of Texas attempted to strike down de facto municipal governments because of technical irregularities in the mode of their incorporation, we submit that this court should exercise its independent judgment as to the soundness of that line of decisions, and hold that the judgment in the Largen case can not be sustained, because of the fact that the state had recognized the City of Lampasas as incorporated in 1883, had permitted it to issue negotiable bonds which had been regis-

tered by its comptroller and circulated upon the markets, and was, therefore, estopped from questioning the validity of said municipal government, and that therefore the corporation, with the boundaries fixed in the charter of 1883, is a valid corporation at this time.

In view of the fact that the present officers of the City of Lampasas do not assume jurisdiction over a part of the territory embraced in the charter of 1883, we ask the court to pass upon this question for the purpose of finally settling the issue as to what property is chargeable with the payment of the bonds issued in payment for the waterworks contracted for by said city in 1885.

SIXTH POINT.

Since the charter of 1873 provided for a city government of the City of Lampasas, to be exercised by a mayor and board of aldermen, and provided for the creation of the office of city secretary, the office of treasurer was necessarily implied; and as the bonds sued upon were issued by the mayor and secretary of the City of Lampasas and purported to be the obligations of said city, and since the charter of 1873 provided that the city might construct waterworks and issue bonds to pay for the same, the purchaser of said bonds was not required to make inquiry as to the manner in which said officers were elected, but could rely upon the de facto character of such officers and hold the City of Lampasas under its charter of 1873.

Under the foregoing proposition we submit that the charter of 1873 provided for the office of mayor of the City of Lampasas, and also for the office of city secretary; therefore these two offices existed by creation of law. The office of treasurer is a necessary feature to all governments, and it was within the implied power of the city council to create such an office. But whether this be true or not as to the treasurer, all that was required of him in the matter of issuing bonds was to register the same in his office and to endorse

such registration on the bonds under section 5 of the ordinance, and there was nothing in the laws of the state requiring such treasurer to have any connection with the issuance of the bonds, and his action was therefore immaterial.

That the acts of a de facto city council bind a municipality, we cite Dillon on Municipal Corporations, 4th ed, section 276.

SEVENTH POINT.

Conceding the validity of the judgment of dissolution in the Largen case, the action of the City of Lampasas in reorganizing under its special charter and four days thereafter surrendering the same and adopting the general charter, and subsequently in December, 1890, extending its limits embracing substantially all of the persons and property covered by the incorporation of 1883 renders this reorganized corporation liable for the debts of the dissolved corporation including the bonds sued upon.

In support of the foregoing proposition we cite the case of Shapleigh vs. San Angelo, 167 U. S., 646, and to the case of City of Lampasas vs. Talcott, 94 Fed. Rep., page 457.

We deem it unnecessary to elaborate upon this point. The facts found to exist by the circuit court show that the business part of the City of Lampasas has at all times been with in the charter limits of 1873. The value of the real estate included within the present limits as shown by the tax rolls of 1889, constitute 90 per cent of the values of the entire city as organized under the charter of 1883. There is no division shown as to the proportion of personal property, and since the business part of the town was within the original limits it is certainly fair to say that fully 90 per cent of the personal property was situated within the present limits. Of the 438 voters shown upon the rolls of 1889, 342 out of the 438 resided within the present limits and 90 per cent of those living in the territory not covered by the present organiza-

tion, did business within the present limits. These facts are shown in the 14th finding and in the 28th finding. All of the improvements and property owned by the municipality of 1883, except about 900 yards of water pipe, are situated within the present city. We, therefore, submit that if the question is reviewable in this court, the finding of the circuit court that the present city embraces substantially all of the persons and property embraced within the limits of the city as it existed under the charter of 1883, is amply sustained, and therefore, the San Angelo case is directly in point.

EIGHTH POINT.

The fifth and sixth propositions of plaintiff in error raise no issue affecting the validity of the bonds and the right of the defendant in error to recover thereon. Under the law of the State of Texas the bonds were valid, if it be conceded that they were sold for less than their face value, and the ordinance requiring them to be sold at face value would not affect the subsequent action of the council in disposing of them directly for the system of waterworks. The defendant in error having shown affirmatively that he was a purchaser in good faith, any irregularity as to the manner in which the trade was made for a system of waterworks to be built to be paid for in bonds would not affect him.

The following are all of the statutory provisions bearing upon the issuance of municipal bonds which were in force at the time the bonds sued upon were issued. These extracts are from the Revised Statutes of Texas, of 1879, and are articles 421 to 424 inclusive.

"Art. 421. All bonds shall specify for what purpose they were issued and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay inter-

est upon or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years.

"Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the state, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to endorse on each bond so registered his certificate of registration and to give at the request of the mayor his certificate certifying to the amount of bonds so registered in his office up to date.

"Art 424. That it shall be the duty of the mayor, at the time of forwarding any of said bonds for registration, to furnish the comptroller with a statement of the value of all taxable property, real and personal, in the city; also with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities."

From the foregoing it will be seen that the statute expressly provides the bonds shall not be invalid if sold for less than their par value. That the declaration in the ordinance that they should be sold at their par value would not bind the council in subsequently disposing of them, we cite the case of City of Waco vs. Chamberlain, 92 Texas, 213.

That all of the requirements of Articles 421 to 424 aforesaid were complied with is shown in the 23rd finding of the circuit court.

That the council after the adoption of the ordinance requiring the bonds to be sold for their face value, itself disposed of the bonds and made a contract directly to deliver

the same in payment for the system of water works, is shown in the twentieth finding of the circuit court.

That the failure of the comptroller to impress his official seal upon his certificate of registration does not affect the validity of the bonds, we cite Bernard Township *vs.* Stebbins, 109 U. S., 341; Draper *vs.* Springport, 104 U. S., 501; San Antonio *vs.* Mahaffey, 96 U. S., 312; Coler *vs.* City of Cleburne, 131 U. S., 165.

Ninth Point.

Counsel for the plaintiff in error contends that because the word registered does not appear anywhere upon the face of the bond, and especially does not appear in the upper left-hand corner, where the city secretary and city treasurer have signed their names, that therefore the city treasurer has not registered the bonds. We feel sure that this court will not concur in any such far-fetched and technical view. An examination of the bonds shows that at the place where it was proper for the treasurer to sign, his name is found affixed. An examination of sections 4 and 5 of the ordinance will show that this is all that is required of the treasurer. Section 5, it is true, uses the term that he shall "endorse the countersigning and registration thereof on each of said bonds." This language evidently means, however, that he is to countersign the bonds after he has registered them. The word "register" means to "record," to "enroll" (Standard Dictionary, volume 2). When the treasurer had, in accordance with section 5, made a record of the bonds, as the law will presume he did since all the records are lost, and then afterwards countersigned his name as he does by placing it in the upper left-hand corner in transverse form and separated from the body of the bond by vignette line, then certainly the ordinance has been fully complied with.

Article 423 of the Revised Statutes of Texas, in force at the time these bonds were issued, is:

"It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to indorse on each bond so registered his certificate of registration, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date."

From the conclusions of fact above set out, it will be readily seen that the comptroller has registered the bonds in a book kept for that purpose, and this counsel concede, but they contend that the endorsement on the back of the bond, "Registered March 28, 1885, William J. Swain, comptroller," was not a compliance with the statute, because this certificate must be authenticated by his official seal. We have made a very careful examination of the cases and text books bearing upon this question, and we have yet to find the case where any court held that the mere failure of the comptroller or similar officer to affix the seal to his certificate of registration would invalidate or affect the bond in any manner whatever. The principal case relied on by the city is Anthony *vs.* Jasper County, 101 U. S., 693. The bonds under consideration in that case were issued at a time when it was required by the law of Missouri that before any bond, issued for any purpose whatever, shall obtain validity or be negotiated, such bond should be first presented to the State auditor, who was required to register the same in a book and to certify by endorsement on the bond that all the conditions of the laws have been complied with. The bonds issued by Jasper county and sued on by Anthony had no such certificate of the auditor, and the court held that, not having complied with this law, Anthony was not entitled to recover. Here, however, the bonds are certified to by the comptroller. The only question is, Are they void, he evidently, through inadvertence, having omitted his seal? It has been held by

the Supreme Court that where the issue of bonds is authorized the accidental omission of the seal cannot be set up as a defense (Bernard Township *vs.* Stebbins, 109 U. S., 341; Draper *vs.* Springport, 104 U. S., 501; San Antonio *vs.* Mahaffey, 96 U. S., 312).

In the cases cited by the city it was not the seal of the officer whose duty it was to register the bonds that was omitted, but the seal of the municipal corporation itself, which it will be at once perceived presents a very much stronger state of facts than at bar. It must also be borne in mind that at the time of the issuance of these bonds the law in Texas did not declare that the bonds should be invalid or not be susceptible of negotiation because of the failure on the part of the comptroller to register the name. No such conclusion can be put upon article 423, nor did the Texas law in force when the bonds were issued declare that bonds are valid only when the comptroller placed his seal thereon. It is well settled that where there are no negative words in the statute under which the official acts declaring or necessarily implying that the failure to affix the seal will render the instrument void that the omission of the officer to place his seal upon the bonds will in nowise defeat their enforceable validity. The bonds were marked "registered," as required by law. Surely the mistake to affix the seal, a requirement not mandatory, can have no effect whatever (Draper *vs.* Springport, 104 U. S., 501; U. S. *vs.* Linn, 15 Peters, 290).

Tenth Point.

In answer to the seventh proposition of plaintiff in error, we submit that the question as to overissue of the bonds cannot be raised in this case, for the reason that the only evidence as to the taxable values of the city of Lampasas for the year 1884 is shown in the twenty-third finding to be $1,447,200, and it will be seen that a tax of 25 cents on

each $100 in value would produce $3,618 annually, which is more than sufficient to pay the annual interest of 7 per cent. and the required sinking fund of 2 per cent. upon all the bonds sued upon for the first year, without considering the abatement necessary to be considered in fixing a proper basis for the entire term of fifty years during which the bonds had to run.

Eleventh Point.

In answer to the contention of the plaintiff in reference to the effect of the invalidating acts, it is submitted that the acts of March 2, 1891, and March 30, 1895, passed by the legislature of Texas, effectually cured the irregularity in the incorporation of Lampasas in 1883, and these acts made binding upon said city as it now exists the bonds issued in 1885.

The supreme court of Texas, in the Nolan County bond case, 83 Texas, 200, says:

"Where a contract, which a municipal corporation has attempted to create, is invalid merely for want of legislative power to create it, it can be made valid by a subsequent law."

To the same effect is the language of Judge Dillon:

"In general, however, the legislature may by subsequent act validate and confirm previous acts of the corporation otherwise invalid" (Dillon on Municipal Corporations, 4th ed., sec. 79).

The question then arises whether the validating acts above invoked apply to a municipality such as was Lampasas in 1883. Let us now briefly consider these acts, bearing in mind what we have already said, that the attempted incorporation in 1883 was irregular only by reason of the method adopted to cast off the charter of 1873, and that instead of the citizens voting, had the council

by resolution declared its purpose thereafter, that Lampasas should be a city under the organic charter law, there would have been no irregularity. It will be seen at a glance that the purpose of each act was to make valid that which, but for an informal defect, would have been originally legal. The validating act of 1891 evidently was the result of the ruling of the supreme court of Texas in the Buford, Dunson, Largen, Harness, and other cases already referred to, wherein corporations, having sought to come under the organic charter law in an irregular manner, had in good faith incurred obligations which in equity should be paid by them, and the State, through its legislature, came to their aid and legalized absolutely, what was presumed aforetime to be of doubtful validity, by reason of technical defect alone. This is evident from section 2 of the act of March 2, 1891, which recites that many cities of one thousand inhabitants or more have heretofore attempted to incorporate under the general law, but failed to comply with its provisions, yet have been recognized as cities, incurred debts, purchased property, and engaged in many enterprises for the public good, and in order that the rights of their creditors may not be jeopardized an imperative public necessity exists for putting in effect at once the law. To the same effect and in almost the same words is section 2 of the law of 1895.

Section 1 of the law of March 2, 1891, is certainly broad enough to include a municipality in the condition that Lampasas then was. That city had in 1883 "attempted to become an incorporated city of one thousand inhabitants or more under the general laws of Texas," and had "failed to comply with the requirements of said general law, and yet exercised the functions of a city of the class named and was by the State of Texas recognized as such, and hence the acts of that city after it had attempted to accept the provisions of the general law by the terms of the act now under consideration became "validated and as binding as if the city had been duly and regularly incorporated." An exam-

ination of the verbiage of the first section of the act of March 2, 1891, and likewise that of March 30, 1895, for both are almost the same, will disclose that it was the purpose of the legislature to validate the acts of every municipality of over 1,000 inhabitants, whatever may have been the irregularity by which it attempted to accept the provisions of the general law. Two things only were necessary: First, the city must have had 1,000 inhabitants or more; second, it must have attempted, but failed, to accept the provisions of the general charter act. The language of the first section of the act of March 2, 1891, is extremely broad, for it not only embraces cities of 1,000 inhabitants or more which had attempted to accept the provisions of the general charter act and had failed to comply with all the requirements of the general law, but likewise embraces all cities which are not "included within the literal meaning of those cities which were authorized to accept the provisions of the general law," and also of "towns and villages incorporated under chapter 11, title 17, of the Revised Civil Statutes" or "by special charter or otherwise." Language could not be broader nor could words have been used of more extended significance and meaning.

It will be noted that Lampasas further comes clearly within the proviso in the last part of this section of the act, to the effect "that nothing in the act shall be construed as validating any act of any city or its council unless the same was authorized by the general law of the State under which it was attempting to act at the several dates when the acts were done." At the time when the bonds were issued in 1885, article 374 of the Revised Statutes of 1879 was in effect, as follows:

"Art. 374. To provide, or cause to be provided, the city with water, to make, regulate and establish public wells, pumps and systems, hydrants and reservoirs in the streets or elsewhere in said city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants and to prevent the unnecessary waste of water."

Likewise, articles 420, 421, and 422, which are as follows:

"Art. 420. To appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, water works, and so forth, as they may, from time to time, deem expedient, and in furtherance of these objects they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent. per annum, payable semi-annually, at such place as may be fixed by city ordinance; provided, that the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent. of the value of the property within said city subject to ad valorem tax.

"Art. 421. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay interest upon, or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years."

Hence it will be seen that what the City of Lampasas did in the matter of the issuance of these bonds was clearly within the provisions of the general charter act. It was the evident purpose of the legislature, therefore, to validate the acts of every city of 1,000 inhabitants and over, and hence does Lampasas come clearly within these validating statutes.

Twelfth Point.

The defendant in error, in further answer to the second proposition of the plaintiff in error, respectfully submits that the contention therein made, that the case at bar is to be distinguished from Shapleigh *vs.* San Angelo (167 U. S., 646), is erroneous.

This contention is based upon the claim that in the case at bar the attempted incorporation was void *ab initio* because of the pre-existing charter of 1873, the jurisdiction under which covered a portion of the territory included in the incorporation proceedings of 1883.

In *Shapleigh vs. San Angelo* the situation was, as stated in the opinion of this court, as follows:

"In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case." It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a *bona fide* holder for value.

"As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The State, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the State acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

"This is the general rule, and it is recognized in Texas: 'If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter' (*Graham vs. City of Greenville*, 67 Texas, 62).

"But, in 1890, at the fall term of the district court of Tom Green county, an information was filed by the county attorney against named persons, who were exercising and per-

forming the duties, privileges and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the State, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of the said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Shapleigh *vs.* Angelo, 167 U. S., 646.

While in the case of the city of Lampasas it was held that because of the existence of the old charter (which it had been assumed by the residents of the territory covered by it had been annulled seven years before) the statute required that before the inhabitants of such territory could be incorporated under the general law it was necessary that the city council should meet and pass a resolution to that effect, and that because this had not been done and because, as stated by the court in the Largen case, "the incorporation in 1883 was attempted through an election held by the county judge on application of fifty persons resident within the territory desired to be embraced within the limits of the proposed incorporation as is provided may be done in case of incorporation of a city or town not before incorporated,' the incorporation was held to have been illegal.

All that was done in the Largen case was to grant a judgment of ouster against the officers as not legally entitled to hold their offices.

Largen vs. State, 76 Texas, 567.

Indeed, the Lampasas City case is stronger than the San Angelo case because, in the former, all the territory sought to be incorporated could lawfully be included in an incorporation under the general laws, and the only illegality was in the method by which it was sought to be accomplished, while in the San Angelo case a part of the territory sought to be incorporated could not be lawfully included within the corporate limits there proposed for the reason that such portion was rural land the inclusion of which rendered the incorporation void.

The counsel for the city cite in support of their view decisions of the supreme court of Texas (*Duncan vs. State*, 71 Texas, 65; *Nacodoches* case; *Buford vs. State*, 72 Texas, 182; *Henderson* case; *Largen vs. State*, 76 Texas, 323; *Lampasas* case; *Harness vs. State*, 76 Texas, 567; *Colorado* case; *Lum vs. Bowie*, 18 S. W., 142). These cases all in effect hold that certain attempted incorporations were invalid either because, as in the cases of the cities of Nacodoches, Henderson, and Lampasas, there was in existence a previous incorporation, or, as in the cases of Colorado and Bowie, like San Angelo (Shapleigh case) and Uvalde (Spier case, 91 F. R., 594), the attempted incorporation was in violation of the organic charter law of the State. They merely hold that the persons who have assumed to act as officers were not legally such, but none of them question the binding force of the acts of such persons who assume to be officers, have the reputation of being such, have been recognized by the inhabitants of the real corporate entity as such and likewise by the State authorities, and whose acts have been acquiesced in for a long period of time. Indeed, the supreme court of Texas has always followed the definition given by Lord Ellenborough in *Rex vs. Belford* (6 East., 26), quoted with approval by Judge Butler (*State vs. Carroll*, 38 Conn., 449), to the effect that a *de facto* officer "is one who has the reputation of being the officer he assumes to be, and yet not a good officer in point of law." (See *Land Co. vs. Laigle*, 59

Texas, 344; *McKinney vs. O'Connor*, 26 Texas, 14; *State vs. Hoff*, 29 S. W., 674.)

Nor is there anything in the case of *Walsh vs. St. Genevieve*, 1st Dillon, 130, nor in *De Corah vs. Bullis*, 25 Iowa, 12 which in any way, if carefully examined and analyzed with reference to the facts of this case, decides to the contrary, and so as to the other cases cited on this point.

These cases were not cases where creditors had relied upon the acts of officers of *de facto* corporations. Indeed, what would be the rule under the facts presented in the case at bar is expressly reserved from decision in *De Corah vs. Bullis*, 25 Iowa, 12, at page 18.

Thirteenth Point.

The plaintiff in error is estopped from questioning the acts of the officers of the *de facto* corporation in issuing the bonds.

As the corporation of 1873 is held by the supreme court of the State of Texas to have been in existence when the bonds were issued, and it is shown that all residents within its territory acquiesced in the acts of the incorporation of 1883 and received benefits from the issue of the bonds, it is estopped, it is submitted, from questioning their validity or from claiming that the officers of the incorporation of 1883 were not *de facto* officers with power to bind it.

In Moran *vs.* County of Miami, 67 U. S., 2 Black, 722, said this Court, in upholding the claim of a *bona fide* holder of municipal bonds (at p. 723):

"We repeat now, as appropriate to the subject-matter of the case in hand, as it was in the case in which this court said it, that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or *silence* involve others in onerous engagements and thus defeat

the calculations and claims their own conduct had superinduced."

Moran *vs.* County of Miami, 67 U. S., 2 Black, 722.

Said Lord Denman, C. J., in the leading case of Picard *vs.* Sears, 6 Ad. & E., 469, at page 474:

"The rule of law is clear that where one by his words or conduct causes another to believe the existence of a certain state of things, and induces him to act in that belief so as to alter his own former position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Picard *vs.* Sears, 6 Ad. & E., 469.

Says Bigelow on Estoppel, page 560, referring to the above case:

"In accordance with this case, it is now a well-established principle that where the true owner of property for however short a time holds out another, or allows another to appear, as the owner of or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealings with such apparent owner, they will be protected. Or where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure whether contested at law or in equity. Such rights do not depend upon the actual title or rights or authority of the party with whom they have directly dealt, but are derived from conduct of the real owner which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale."

Bigelow on Estoppel, p. 560.

Says Lord Campbell:

"If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent, and he thereby in-

duces others to do that from which they would otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have given faith to his words or other fair inference to be drawn from his conduct."

Cairncross *v.* Lorimer, 3 Macq. Appeal Cases, 827.

It is submitted that the application of the above rule to the case at bar precludes the plaintiff in error from questioning the validity of the acts of the officers of the incorporation of 1883. Moreover, it is held in Shapleigh *vs.* San Angelo that a State, being the creator of municipal organizations, is the proper party to impeach the validity of their creations, and if it acquiesces in the validity of a municipal corporation the corporate existence thereof cannot be collaterally attacked. Says Mr. Justice Shiras:

"The conclusion which is derivable from the authorities cited and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation."

Shapleigh *vs.* San Angelo, 167 U. S. Reports, p. 655.

Says the court in the case last cited:

"In Mobile *vs.* Watson, 116 U. S., 289, it was held that when a municipal corporation with fixed boundaries is dissolved by law and a new corporation is created by the legislature for the same general purposes, but with new boundaries embracing less territory but containing substantially the same population, the great mass of the taxable property and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor and that powers of taxation to pay them which it had at the time of their creation and which entered into the contracts also survive and pass into the new corporation."

It is found as a fact by the court below (page 36 of the record)—

"That within the city of Lampasas, as now organized, and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people and which was recognized and acted upon by them as a valid city government from its adoption until the *quo warranto* proceedings against Largen and his associate officers in 1889, during which time the officers assumed to act as officers under said general charter, were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same."

It follows from the application of the above rules of law to the facts so found, it is submitted, that the plaintiff in error is liable to the defendant in error for the amount of the judgment rendered against it in the court below, and that such judgment should therefore be affirmed.

HENRY B. R. STAPLER,
ROBERT G. WEST,
T. B. COCHRAN,
Counsel for Defendant in Error.

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Supreme Court of the United States.

No. 115.—October Term, 1900.

The City of Lampasas, Plaintiff in Error, vs. James M. Bell. } In error to the Circuit Court of the United States for the Western District of Texas.

[February 11, 1901.]

This suit is brought to recover the amount of certain unpaid coupons for interest on "Lampasas City Water Work Bonds." The main controversy on the merits depends upon whether the plaintiff in error is the same municipal corporation which issued the bonds or is its successor in liability. There are minor questions turning upon the provisions of ordinances and the observance of their requirements. Besides, a question under the Constitution of the United States is claimed to have been raised in the Circuit Court by the plaintiff in error, and upon this is based the right to bring the case here rather than take it to the Circuit Court of Appeals. The facts are stipulated and are very voluminous, but the view we take of the constitutional question enables us to omit much detail.

The city of Lampasas was incorporated by special act of the legislature in 1873, under the name of the "corporation of the city of Lampasas," with boundaries containing an area of 553 acres. Its officers were to be elective, and consist of a mayor, a board of aldermen of eight members, five of whom should constitute a quorum. Their term of office was to be two years and until their successors should be elected and qualify. The act made no provisions for the dissolving of the corporation. The city was given power to construct water works, impose and collect taxes, not exceeding one per cent. per annum, and to issue bonds for public improvements.

Officers were elected, and the municipal government was exercised by them from 1873 to 1876. In 1876 a mayor and aldermen were elected who favored abolishing the municipal government. They formally resolved to resign and did so, and abandoned their offices. What municipal government, if any, existed between 1876 and 1883 the record does not show. It is, however, stipulated that the city was the "county seat of Lampasas County and had a population in 1876 of about 800: that until the year 1882 the said town was without railroad facilities, when upon advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4,500 people with street railroad and other improvements. About 1884 the population began to decline, and continued to decline until about 1890." Until 1882 the business part of the city was

generally confined to the court-house square and to streets laid out from it and were within the territorial limits as originally incorporated. In 1882 and afterwards business houses were built outside of said limits but inside the boundaries as incorporated in 1883, hereinafter mentioned, and business has been transacted there since.

In February, 1883, under the provisions of the general laws of Texas, Title XVII of the Revised Statutes, upon a petition of more than fifty qualified voters, living in and around the limits of the city, was presented to the county judge who, in accordance with the prayer thereof, ordered an election to determine whether the persons living within the limits in the petition set out should incorporate as a city of more than 1,000 inhabitants. The election was held, resulting in a majority vote for incorporation—persons voting who lived inside and outside of the limits of the special charter. Upon the return of the election the county judge declared the result, and declared the city duly incorporated within the limits petitioned for, which embraced practically all of the lands within the special charter, and extended nearly one-half mile west, north and east thereof, to and including the railroad depot—an area of 1,495 acres.

A municipal government was organized with the officers prescribed by the law—some of the aldermen residing outside of the limits contained in the special charter—and exercised all of the functions of a city of 1,000 inhabitants organized under the general laws of the State, without any one contesting or disputing the validity of its lawful right to do so, until November 4, 1889, when proceedings in the nature of *quo warranto* were instituted to declare the incorporation of 1883 invalid on the ground that the special charter of 1873 had never been repealed.

The suit was instituted without the direction of the attorney general of the State or other executive officers, and without making any of the creditors of the corporation parties. The judgment of ouster was entered against the officers of the city, which was affirmed on appeal by the Supreme Court of the State. (*Largen* v. *State of Texas*, 76 Texas, 323.)

The ousted officers thereafter ceased to act, and upon authority of the county judge officers were elected on the 22d of March, 1890, as provided in the charter of 1873, and by persons living within the limits defined by said charter, and the mayor and aldermen so elected organized March 19, and on the 22d by unanimous vote resolved to accept the provisions of "Title XVII of the Revised Statutes of the State of Texas in lieu of the charter granted by the legislature." A copy of the resolutions was duly certified and recorded, as required by law, and the city at once assumed to act under the general charter provided in Title XVII, and is now acting thereunder.

On December 26, 1890, there was added to the city by a vote of the citizens of the added territory a greater part of the lands west which were

included within the limits of 1883, and one tier of blocks additional and the city assumed, and has since exercised jurisdiction over that part lying north and east of the limits of 1873, and which was included within the limits of 1883. The area added contained 428 acres, and embraced the greater part of the residence property of the city outside of the original charter limits of 1873. The property lying north and east of the original limits, and not included within the incorporation of 1890, contains seventy-seven residence houses, occupied by persons, ninety per cent. of whom follow some kind of business within the town as defined by the limits of 1873.

The books and papers of the city government under the charters of 1873 and 1883 were lost, except the assessment rolls of 1889, from which it appears that the assessed value of all lands within the city limits of 1889 was $664,420, personal property about $400,000, and that the assessment was divided as follows: As to lands, no division being shown as to personal property, viz., within the limits of 1873, $452,444; within that part added in December, 1890, $157,915; and within the parts north and east, $68,970. The assessment roll also showed the names of 438 voters, divided as follows: Old limits of 1873, 175; part added in December, 1890, 167; parts north and east, 96.

In January, 1885, acting under the then charter, and not under the charter of 1873, the city, in good faith, upon the demand of the business men of the city for fire protection, and to furnish water to the city, then having a population of 4,500, determined to build a system of water works, and to pay for the same by the sale of bonds, and to this end, after full and fair discussion, passed the ordinances under which the bonds in controversy were issued.

The other facts relate to the passage of the ordinance providing for the building of the water works for which the bonds were issued; the advertisement of bids under the ordinance; the inability of the city to get other than cash bids; the awarding, in consequence, of the contract to a bidder who was willing to build a system for $40,000, whereas the actual cost of the work, allowing nothing for profits to the contractor, was $26,276; the location of the works, some portion being shown to be inside the limits of the new incorporation, and some portion outside such limits; the payment of interest on the bonds for 1889; the decision of the city in 1892 by vote to take charge of the public schools and maintain them, and in 1893 to build a school building, and the issuing of bonds therefor amounting to $18,000, bearing interest at six per cent., and by the proceeds of which a school building was erected, it being believed and the fact certified to the State comptroller that the city had no outstanding bonds; the form of the bonds and their endorsements, and the formalities of their execution, and what appeared as to their registration in the office of the State comptroller, and what appeared as to the assessed value of the property of the city.

It was also stipulated that the defendant in error is the owner and holder of 102 coupons each, for the sum of $35, maturing at different dates, which coupons except as to due date and number of bond are of the following form:

"$35. The City of Lampasas $35.
will pay the bearer thirty-five dollars at the office of S. M. Swenson & Son, in the city of New York, or at the treasurer's office, in the city of Lampasas, on the 1st day of ——, 189–, being six months' interest on bond No. —.
S. S. Potts, *Secretary.*"

And it was further stipulated that of those coupons, "forty-two in number, being numbers 9 to 15, inclusive, on bonds Nos. 8 to 13, inclusive, became due more than four years before the institution of this suit, and if plaintiff is entitled to recover in this action he is entitled to recover the sum of $2,100 principal and $452.70 interest, due on the remaining sixty coupons mentioned in his petition."

From the facts the Circuit Court found the following:

"That within the city of Lampasas, as now organized and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them as a valid city government from its adoption until the *quo warranto* proceedings against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same."

And as conclusions of law found:

"1. The coupons in suit constitute a valid and existing liability against the present city of Lampasas, except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation, and the remaining 60 coupons sued upon, not being barred by the statute, are valid, and the defendant should be required to pay the same. (*Shapleigh* v. *San Angelo*, 167 U. S. 646; *City of Lampasas* v. *Talcott*, decided by Circuit Court of Appeals, Fifth Circuit, on the — day of ——, 18—.)

"2. Judgment is therefore rendered in favor of the plaintiff against the defendant, the city of Lampasas, for the sum of $2,552.70, with interest thereon, at the rate of six per cent. per annum, from the date hereof, and all costs of suit. To the judgment rendered and the additional conclusion of fact the defendant in open court excepts."

The Circuit Court then allowed this writ of error.

Mr. Justice McKenna delivered the opinion of the Court.

The principle and contention of the assignments of error, which are based on the Constitution of the United States, are expressed in the fourth assignment, as follows:

"The court erred in its last conclusion of facts, its conclusions of law and the judgment rendered thereon because the organization formed in 1883 under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable, but wholly void, for the reason that such organization was attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, which general laws of the State of Texas then in force and embraced in Title XVII of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, were in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation."

The same claim was made in substantially the same words in the answer of the plaintiff in error in the court below, and the specific injury alleged was "that the taxpayers residing within the boundaries fixed by said act of 1873 will be required to pay more than one-half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law."

This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases, one of which is when "the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." (Sec. 5 of the Judiciary Act of 1891, 28 Stat. 826.) But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western Union Telegraph Co.* v. *Ann Arbor Rd. Co.*, (178 U. S. 239): "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. (*Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571.)"

It is contended that the residents of the territory incorporated in 1883, ~~not included within the limits of the special charter of 1878,~~ were not given an opportunity to be heard "whether they should or should not be included in or made subject to taxation in the proposed corporation." It is hence deduced that the incorporation of 1883 was wholly void and in consequence the bonds sued on were also wholly void, because the law of

the State under which the incorporation was made, to wit, Title 17 of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby, was in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. But what concern is it of the plaintiff in error whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in "territory proposed to be incorporated;" it was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits. And the record shows that there was no question of its validity for six years. When questioned it was not on the ground that it was incorporated under an unconstitutional statute—not on the ground that it was imposed without a hearing on unwilling subjects—but on the ground that the prior incorporation of 1873 had not ceased to exist.

We said in *Clark* v. *Kansas City*, 176 U. S. 114, (quoting from Cooley's Constitutional Limitations, section 196,) that "'a court will not listen to an objection to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.'" That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. "To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." (*Wellington, Petitioner*, 10 Pick. 87, 96.)

It follows necessarily that the plaintiff in error has no legal interest in the constitutional question which it raised, and upon which it claims the right to come directly to this court from the Circuit Court under section 5 of the act of 1891, *supra*. To permit it to come here directly from the Circuit Court would make a precedent which would lead to the destruction of the statute. We repeat, the questions which can be raised under any of the subdivisions of section 5 of the act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.